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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-494

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on June 21, 1973, enforcing an order of the National Labor Relations Board.

CITATIONS TO OPINIONS BELOW

The Memorandum of the Court of Appeals will not be officially reported and is reproduced in the Appendix to this Petition at App. 113. The majority decision and order of the National Labor Relations Board (App. 90), the Board Chairman's dissenting opinion (App. 107) and the Decision of the Administrative Law Judge finding no violation of the National Labor Relations Act (App. 1) are reported at 197 NLRB No. 134.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1973 (App. 114-115). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not a Regional Director and the General Counsel of the National Labor Relations Board exceed their authority when, at the request of the charging party, they set aside a settlement agreement which was signed by all parties and with which Petitioner fully complied where there was no contention of a further or continuing unfair labor practice.

2. May the National Labor Relations Board hold that industry seniority employment benefits, in the motion picture industry, obtained under an admittedly otherwise legal collective bargaining agreement, represent illegal encouragement of union membership under the National Labor Relations Act solely because the computation of

seniority relates to time worked under such agreement in the face of detailed findings by the Administrative Law Judge, undisturbed by the Board, that employment and employment seniority were not based upon union membership or like considerations.

STATUTE AND RULES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 8(b) 1(A) and 2 of the National Labor Relations Act, as amended (61 Stat. 140, 29 U. S. C. 158 (b)). They provide as follows:

> SECTION 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:
>
> * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues once the initiation fees uniformly required as a condition of acquiring or retaining membership.
>
> * * *

The relevant provision of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended (29 C.F.R. Part 102) is as follows:

> Section 102.51 *Settlement or adjustment of issues.* —At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with

whom the charge was filed, for consideration facts, arguments, offers or settlement, or proposals of adjustment.

The relevant provision of the Statements of Procedure of the National Labor Relations Board, Series 8, as amended (29 C.F.R. Part 102) is as follows:

> Section 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submission and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

STATEMENT OF THE CASE

This case concerns itself with the employment seniority system in the motion picture industry in Hollywood, California. While the Petitioner, representing the professional motion picture cameramen, is Local 659, IATSE ("Union"), each craft in Hollywood, California has a similar, if not identical, seniority system. The Interna-

tional Alliance of Theatrical Stage Employees ("IATSE") has 22 affiliated local unions in Los Angeles County, California representing from 16,000 to 20,000 employees engaged in the motion picture industry. Petitioner, Local 659, is one such local union. From the time the making of motion pictures reached the level of being considered a major industry, an employer association, now known as the Association of Motion Picture and Television Producers, Inc. ("Association"), handled all collective bargaining for the industry and negotiated an identical agreement for all employers (with the individual employer's consent) without requiring an employer to and irrespective of whether the employer had elected to physically join this employer association. The unions certified[1] to represent the employees are the IATSE and its various craft local unions such as the Petitioner, Local 659. Currently there are approximately 70 employers who are members of the Association and numerous non-members. All such employers, irrespective of membership in the Association, are covered by the identical collective bargaining agreement (App. 17, 94).

Motion picture cameramen possess specialized technical and artistic talent. Their employment is not continuous with one employer but rather is spasmodic and dependent upon whether a particular employer is then making a motion picture and the type of skills and talents he de-

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1. In 1951, the NLRB conducted (under the then law requiring same) one secret ballot "UA" election (union shop authorization) in the instant bargaining unit which it deemed appropriate and which consisted of all motion picture camera employees of the industry employers some of whom were members of the Association, some members of other associations and others, nonmembers of any association. One election was held for all employees irrespective of whether or not their employer had elected to join an employer association. NLRB Case No. 21-UA-2725.

sires. To provide some continuity of employment and to develop and maintain a skilled pool of manpower, the seniority "roster" system in question here came into being in 1949. Basically, it provides for preference in employment for employees who have worked in the "crafts and classifications of work subject to (the collective bargaining) agreement". As regards Local 659, the agreement spells out three seniority groups per classification (such as director of photography, camera operator, assistant cameraman, animation cameraman, *etc.*). No employee is entitled to preference of employment over another employee within the same group—the employer retains the right of selection. The employer must, however, first exhaust the employees available in the first group in a particular classification before moving to the second and must similarly then exhaust the second group before moving to the third. If available employees in all three groups are exhausted, the employer may hire from any source it desires. To obtain roster status, an individual must be employed by an employer signatory to the agreement for 30 days or for a combined total of 90 days by any number of such employers. Once an individual obtains roster status he moves from the lower group 3 to the highest group 1 after having worked 130 days for signatory employers. There is no priority within a group —all employees, no matter when they entered the group, have equal rights of employment. Nor is the situation a dormant one, for as the Administrative Law Judge found, 324 names were added to the cameramen's roster between 1966 and 1970 bringing the total up from around 1200 to in excess of 1500 or an increase of over 25% (App. 25, 26).

The Union has nothing to do with placement on or the maintenance of the roster (App. 27). This is maintained

by the Association exclusively "for all signatories to the Agreement regardless of whether or not the employer is a member of the Association" (App. 23) and placement occurs after an employer committee determines that an applicant meets the employment criterion and the committee's qualifying requirements (App. 23-24). The Administrative Law Judge found that union membership or other union considerations played no part whatsoever in securing roster placements, movement from one group to another or employment (App. 26-28).

In addition to negotiating for all employers and maintaining the roster system for all, irrespective of whether or not an employer is a member of the Association,[2] the Association maintains and administers a "Contract Services, Administration Fund". As the Administrative Law Judge found, "Whether or not an employer is a member of the Association, of an independent association or a member of no association, there is one central Health and Welfare Fund for active employees, one central Health and Welfare Fund for retired employees and one Pension Plan all provided for under the Basic Agreement. In addition, the Basic Agreement provides for a Contract Services, Administration Trust Fund which is administered by the Association and to which employers pay a specified amount for each hour worked by an employee in the unit. Whether or not an employer is a member of

2. The Agreement signed by the non-members of the Association, in effect, delegates to the Association the sole responsibility for bargaining in that the individual employer agrees to be bound by the results of the negotiations between the Association and the Union, retaining the right to withdraw after notification but prior to the commencement of negotiations (App. 17-22). "(N)o individual employer or group of employers has (ever) elected to seek separate negotiations" except one, in business only in the year 1954 (App. 18-19).

the Association, the monies are administered by the Association for the benefit of all those who sign a Basic Agreement and the employees of such employers and used for establishing and maintaining training programs, safety procedures and the experience Roster systems" (App. 22).

The Unfair Labor Practice Charges and the Settlement Agreement

On December 20, 1966, one Joel Colman was denied employment, at the insistence of the union, by MPO-TV of California (an employer covered by the agreement but not a member of the Association) because he lacked roster status. Colman filed Section 8(b)(1)(A) and (2) charges against the Union claiming that the seniority roster was *per se* illegal and additionally that preference in employment was based upon Union considerations with members of Local 659, its permit holders and members of sister locals being given preference in employment over non-members. The matter was retained by the Board's General Counsel for a substantial period of time without a complaint issuing and finally, on November 22, 1968, the Union, pursuant to the Board's Statements of Procedure[3] and its Rules,[4] after extensive discussion with the

3. Section 101.7 of the Board's Statements of Procedure entitled "Settlements" provides in pertinent part as follows: "Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of . . . offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the re-

Board's General Counsel and its Regional Director, entered into an "all party" (including the charging party) written settlement agreement. Disclaiming that it had engaged in any unfair labor practice, and to dispose of the matter, the Union signed the Settlement Agreement agreeing that it would not "interpret our collective-bargaining contracts with the Association of Motion Picture Producers, Inc., its members, or nonmembers in a manner to discriminate against any employee with respect to his initial placement on the Industry Experience Roster on the basis of union considerations," and that preference in employment would not be "based . . . upon membership" in the instant Union or its sister locals. The Settlement Agreement also provided that the charging party, Joel Colman, would be made whole for any loss of back pay, "such amounts to be determined by the Regional Director. . . ." The seniority system (roster) remained undisturbed and the Union, while disclaiming that preference in employment had been granted based upon Union considerations, *i.e.*, membership in the Union or the payment of permit fees, agreed that such Union considerations would have no effect whatsoever on the seniority system.

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spondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel. . . . by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed."

4. Section 102.51, Board Rules and Regulations entitled "Settlement or adjustment of issues" provides: "At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with whom the charge was filed, for consideration . . . offers of settlement, or proposals of adjustment."

On July 14, 1969, the Regional Director, pursuant to the Settlement Agreement, determined that Colman should receive two days' pay or $400.00. Although agreeing that the Regional Director would determine the amount of money to be paid, Colman's attorney (Adler) now objected. Over the objection of the Union, the Regional Director permitted Adler to withdraw from the Settlement Agreement. He then, however, refused to issue a complaint against the Union and Adler appealed such refusal to the Board's General Counsel. On December 2, 1969, the General Counsel of the Board affirmed the refusal to issue the complaint and this then appeared to dispose of the matter, the Union having implemented the Settlement Agreement (notice posting, notifications, *etc.*) and at all times being willing to pay the $400.00. Adler then applied for "reconsideration" and on "reconsideration", the Board's General Counsel reversed himself, directing that a Complaint issue.[5]

The Complaint and Trial

A Complaint issued against the Union on September 8, 1970. The Complaint claimed that preference of employment was illegally given to members of the Union, those who paid permit fees to it and members of sister locals and also that the seniority roster system was illegal in its application. The trial of the case consumed eight days

5. The General Counsel directed that a Complaint issue under Section 8(b)(1)(A) of the Act only. The only apparent reason for issuing under Section 8(b)(1)(A) instead of under Section 8(b)(2), or both, was because of the General Counsel's thinking that Colman was not an "employee" under the National Labor Relations Act, but rather was a supervisor and no complaint could issue under Section 8(b)(2). While both sections of the Act protect only "employees", we do not present this issue to the Court in our Petition because of the importance of the other questions in which certiorari is sought.

and on June 18, 1971, the Administrative Law Judge[6] issued a 56 page decision in which he meticulously analyzed all of the facts in the record with respect to General Counsel's contention that the seniority system was illegal generally and in its application. He similarly analyzed the contentions made relative to the permit system and the claimed preference for members of the Union and its sister locals. He factually found that preference did not exist and had not existed and that employment was not based upon Union considerations, Union membership or permit requirements; that the Roster system was a legal application of the concept of seniority and that no violation existed. He recommended dismissal of the Complaint in its entirety (App. 32-62, 88-89).

Post Trial Action and the Divided Board's Decision

Following the issuance of the Administrative Law Judge's decision and the request for an extension of time to consider same, counsel for the General Counsel advised all parties that it would *not* file exceptions in the matter, *i.e.*, that the decision would stand. Adler, as counsel for Colman, then wired the Board seeking an extension of time within which to file exceptions, stating that the request was made "in order to permit (him) to request the Office of General Counsel to reconsider its position with regard to the filing of Exceptions in this matter." Thereafter, on August 27, 1971, counsel for the General Counsel again reversing his position, advised the Board that he "now plans to file exceptions in the above-entitled matters." The General Counsel, not Adler, then filed exceptions and in a 2 to 1 decision, with the Board's Chairman

6. Then called "Trial Examiner".

dissenting, the Board overruled the Administrative Law Judge and found that the motion picture seniority Roster system was illegal *per se* when applied to non-members of the Association. Board Chairman Miller's dissent addressed itself to the efficacy of the Settlement Agreements which had, of course, condoned the legality of the seniority system, absent the existence of preference based upon membership in the Union or the payment of permit fees to it. And even the two-man majority of the Board left undisturbed the findings of the Administrative Law Judge that the Union had engaged in no illegal activity and that preference of employment was not based upon Union considerations, Union membership or the payment of permits in any respect. The majority, as regards the Settlement Agreements, held that ". . . there was no meeting of the minds when the settlement agreements were executed" (App. 93). Dissenting Chairman Miller, commenting on the majority's reasoning, held that "A majority of my colleagues find that there was 'no meeting of the minds when the settlement agreements were executed.' I cannot agree. All parties agreed in writing that the amount of backpay was 'to be determined by the Regional Director in accordance with existing Board formula.' That, in my view, was a binding agreement, and cannot be vitiated merely because one party subjectively 'expected more' than an amount determined by the method to which he had agreed" (App. 107, fn. 19). Chairman Miller stated that "About 4 years ago this case was settled. The settlement agreements were signed by Respondent and Charging Parties and were approved by the Regional Director. The agreements provided for backpay, with the amount to be determined by the Regional Director. He determined the amount to be $400, as to Charging Party Colman. A few days thereafter, Colman asked permission to with-

draw from the agreement. For what reasons we do not know, the Regional Director permitted him to do so, although Respondent asserts, without contradiction, that it was willing at all times to comply with the agreement" (App. 107). Chairman Miller citing "a line of cases going back over the decades and continuing through the years" held that "the agreement should have been honored and, that being true, the complaint should be dismissed and the settlement agreement reinstated" (App. 108); "that a Regional Director may not set aside a settlement agreement and issue a formal complaint **unless the charged party has failed to comply with its terms or committed further unfair labor practices**" (App. 108) (Emphasis supplied). No contention of failure to comply or the commission of further unfair labor practices was made or even alluded to. Citing a list of Board cases, the Board's Chairman concluded that "Considerations of equity also require that a respondent which has in good faith bound itself to a course of complying with such an agreement should be entitled to rely on compliance . . . and not be subject to . . . whim or caprice . . . after a definitive agreement has once been executed . . ." (App. 108). The Chairman was particularly interested in Board policy stating that "We have a real interest in settling charges, since if it were not for the fact that over 90 percent of such charges are disposed of by settlement and other early methods of disposition at the Regional level, this Board would be inundated by such a caseload that we would be totally paralyzed . . . how can we expect Respondents seriously to consider entering upon settlement discussions" if settlement agreements can be set aside when further unfair labor practices are not committed (App. 108-109).

In its divided decision, the Board did not reverse the Administrative Law Judge as regards his findings that employment preference was not based upon Union membership, Union considerations or the payment of permit fees. The Board basically affirmed his findings of fact in this respect and stated that "It is well settled that a bargaining representative for the employees of the particular unit has the right to make seniority depend on the date of hire in the unit and thus give an inferior seniority ranking to employees transferred from another unit" (App. 98). It also acknowledged that individual employers by joining an employer association could have a single seniority system amongst the employees of all such association members. Disagreeing with the Administrative Law Judge, however, the Board majority held that a finding of illegality could revolve solely around whether or not an employer had physically joined an employer association. Despite the fact that employees had worked for many employers covered by the Agreement, all of whom had agreed to be bound by the results of the negotiations between the Association and the Union and had signed the identical contract, the seniority acquired by such employees was no longer of any value and the Union, and, accordingly, the Association and all employers, were prohibited from granting continuous seniority for work performed to such employees. The majority stated that "Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent" (App. 99). Discrimination occurred, said the majority, because the se-

niority was based upon "union representation" and this was illegal unless the employer physically joined the employer association.

The Court of Appeals Memorandum

On June 21, 1973, the Court of Appeals for the District of Columbia entered judgment enforcing the Board's order. No decision was written and the Court's short memorandum appears at page 113 of the Appendix.[7]

7. No reference was made by the court to the amicus brief filed by the Association which had pointed out that rather than effectuating the purposes of the Act, the Board's order if permitted to stand, would instead create chaos in the industry and destroy the employer's ability to maintain an effective labor pool of specialized craftsmen upon which to draw.

ARGUMENT

REASONS FOR GRANTING THE WRIT

1. The Settlement Agreement. In 1968, to dispose of the present case filed in 1966, the Union entered into a settlement agreement with all parties agreeing that the Regional Director would subsequently determine the back pay, if any, due the charging party. The settlement agreement was entered into in accordance with the Board's Statement of Procedure and its Rules (fns. 3 and 4, *supra*) and had the approval of the Board's General Counsel before being executed by the Regional Director. The procedure was routine and the terms of the settlement agreement standard. The Regional Director determined that there was $400.00 due and thereafter, over the objection of the Union, the charging party secured the approval of the Regional Director to withdraw from the settlement agreement. The Regional Director thereafter dismissed the charge and the dismissal was sustained by the General Counsel who later reversed himself when the matter was submitted to him for "reconsideration". The roster seniority system being attacked herein was left undisturbed by the settlement agreement.

The Court of Appeals Memorandum disposes of the settlement agreement in one sentence, without citation, merely stating that "The Board properly refused to give effect to the aborted settlement agreements between the charging parties and the respondent" (App. 113). Its decision is in direct derogation of this Court's decision in *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944). Moreover, it conflicts with the decisions of the Fifth, Sixth and Eighth Circuits where the issue has had direct con-

sideration[8] and of the Second, Fourth and Tenth Circuits where there has been implicit consideration.[9] The decisions of the foregoing six Circuits all stem from this Court's decision in *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944) as is illustrated in *NLRB* v. *Bangor Plastics*, 392 F. 2d 772, 775 (1967) where the court stated "It is only when a party to the settlement agreement has breached its terms or has committed further illegal acts, that the regional director is justified in setting aside the settlement agreement and issuing a formal complaint." The decisions of all six Circuits contained at least a colorable contention that some act or activity of the respondent generated the setting aside of the settlement agreement. Here no such contention was made but the settlement agreement was set aside solely because the charging party did not like the dollar amount which had been determined in accordance with the procedure with which he had previously agreed in writing.

If the Board's order is put into operation, complete havoc will occur and the disruption in the motion picture

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8. **Fifth Circuit:** *News-Texan, Inc.* v. *NLRB*, 422 F. 2d 381 384-385 (C.A. 5, 1970); *NLRB* v. *Southeastern Stages, Inc.*, 423 F. 2d 878, 880 (C.A. 5, 1970). See also, *NLRB* v. *Guild Industries Manufacturing Corp.*, 321 F. 2d 108, 110 (C.A. 5, 1963). **Sixth Circuit:** *Lincoln Bearing Co.* v. *NLRB*, 311 F. 2d 48, 50 (C.A. 6, 1962). See also, *NLRB* v. *Superior Tool and Die Co.*, 309 F. 2d 692, 695 (C.A. 6, 1962). **Eighth Circuit:** *NLRB* v. *Arrow Specialties*, 437 F. 2d 522, 526 (C.A. 8, 1971).

9. **Second Circuit:** *NLRB* v. *Dressmakers Joint Council*, 342 F. 2d 988, 989 (C.A. 2, 1965). **Fourth Circuit:** *Radiator Specialty Co.* v. *NLRB*, 336 F. 2d 495, 497 (C.A. 4, 1964). **Tenth Circuit:** *NLRB* v. *Western Meat Packers, Inc.*, 368 F. 2d 65, 70 (C.A. 10, 1966). In *International Brotherhood of Teamsters, Local 554* v. *NLRB*, 262 F. 2d 456, 459 (C.A.D.C., 1958), the District of Columbia Circuit (fn. 2), without further comment, stated that "Subsequent unfair labor practices allow the Board to go behind the terms of a settlement agreement", vacate it and issue a complaint.

industry will be incalcuable. Moreover, as dissenting Board Chairman Miller pointed out, over 90 per cent of unfair labor practice charges are disposed of by settlement and the Board would be inundated and "totally paralyzed" if settlement agreements were not honored and respondents would thus not seriously consider entering into settlement discussions. The Board Chairman pointed out that considerations of equity and good faith required that settlement agreements be binding and that they not be subject to "whim or caprice." Citing cases "going back over the decade and continuing through the years", the Board Chairman held "that a regional director may not set aside a settlement agreement and issue a formal complaint unless the charged party has failed to comply with its terms or committed further unfair labor practices." He concluded that "In my view the agreement should have been honored and, that being true, the complaint should be dismissed and the settlement agreement reinstated."

Thus, apart from the fact that the holding of the court is in conflict with that of all the other circuits and is in direct derogation of this Court's decision, the problem is even more pervasive, as Board Chairman Miller pointed out. In fiscal 1972 there were 26,852 unfair labor practice cases filed with the Board, an increase of about 13 per cent over the prior fiscal period and almost double the number filed a decade earlier.[10] As regards the unfair labor practice cases closed, the Board reports[11] that 25,555

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10. Thirty-Seventh Annual Report of the National Labor Relations Board for the fiscal year ending June 30, 1972 at page 13.

11. Id. at page 15.

were closed in the same period and of this number 93.3 per cent were closed by the regional offices, meaning that except for the charges withdrawn or dismissed, the balance of the 93.3 per cent were closed by settlement agreements. The settlement procedure, as reflected by the Board's Rules and its Statements of Procedures represent an integral and essential part of its mode of operating with which all practitioners are familiar. Settlement agreements are, of course, utilized by many administrative agencies but the very core of the NLRB is bottomed upon settlement and even apart from avoiding the serious administrative problem, the Act is best effectuated by the adjustment of disagreements because of the continuing nature of labor relations and the fact that a proper balance must be drawn between the corresponding rights and obligations of the participants. Here, the charging party successfully had the written all-party settlement agreement set aside because he disagreed with the amount of money determined by the Regional Director to be paid him—and this in face of the fact that the charging party, with counsel, had signed the settlement agreement and had agreed that the Regional Director would make the determination. Even apart from the effect upon petitioner, the impact upon the motion picture industry, and the fact that the instant decision defies this Court's decision and those of various circuits, it becomes exceptionally clear that Chairman Miller's fear of the potential paralysis of the agency is indeed meaningful. Two members and two members only of the Board deviated from the Board's own rules and determined to vitiate the settlement agreement. The Court of Appeals decision sheds no light upon the problem except to sustain the bare majority holding of the Board. This Court's intervention is essential not only to protect this Petitioner but to protect the litigants

who appear before the Board and the Board's processes, as well.

2. The Legality of the Seniority Roster System. The decision of the Court of Appeals in the instant matter is in direct conflict with this Court's decision in *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 (1961) and with the decisions of three Circuits[12] issued since *Local 357, Teamsters*. Overruling the Administrative Law Judge, who had relied upon *Local 357, Teamsters*, and specifically "respectfully disagreeing" (App. 97, fn. 8) with the First Circuit,[13] a divided Board held that it was illegal to base industry seniority upon work acquired under a single collective bargaining agreement, *i.e.*, union representation, unless an employer had physically joined an employer association. If an employer had joined an association—here The Association of Motion Picture Producers—then the Board would hold the single seniority roster system herein legal but, said the Board, if an employer does not physically join the Association then such non-association member and employees who had worked for it could not legally share in the valid single seniority system enjoyed by those employers who had joined and were paying dues to the Association. This despite the fact that all employers, whether they were members of the major association (the Association of Motion Picture Producers), small associations or members of no association, as the Administrative Law Judge found, subscribed and agreed to the identical collective bargaining agreement resulting from

12. First, Third and Seventh Circuits: *NLRB* v. *Whiting Milk Corporation*, 342 F. 2d 8 (C.A. 1, 1965); *Rosen* v. *NLRB*, 455 F. 2d 615 (C.A. 3, 1972); and *Schick* v. *NLRB*, 409 F. 2d 395 (C.A. 7, 1969).

13. *NLRB* v. *Whiting Milk Corporation*, 342 F. 2d 8 (C.A. 1, 1965).

one negotiations and creating one central health and welfare fund, one pension plan and one contract services administration trust fund, contributed to by all employers, the monies of which were administered by the Association for the benefit of all employers and all employees for the purpose of establishing and maintaining training programs, safety procedures and the seniority roster systems. The Act is violated, says the Board, because preference in employment is based on union representation—but only violated sometimes. This same union representation under the same collective bargaining agreement is legal but only if the employer coincidentally joins the Association; otherwise the seniority roster system must be maintained for the individual employer alone. Everything else remains the same—the same employee funds, the same contract, the same benefits, the same industry, the same mobility but the line between validity and invalidity is the simple act of joining the Association.

The result of the Board's decision is to do away with industry seniority and the employers resultant ability to maintain an available pool of qualified personnel. Under it Association members would have one seniority system but could not draw upon employees who had worked for non-association signatory employers until they first exhausted their own roster. Conversely, the non-association member could neither draw upon employees who had worked for other signatory employers or for Association members but would be first confined to its own roster. And, even as applied to Colman (the charging party), under what the Board proposes, Colman would not have been entitled to work for MPO-TV of California (the individual employer involved) because it would have had its own individual roster which it would first have

had to exhaust and upon which Colman's name would not have appeared—Colman never having worked for MPO-TV a sufficient amount of time to acquire roster status with it.

The short Memorandum of the Court of Appeals casts no light upon the subject matter, but the result is clear —it upholds the Board and accordingly finds illegality. The decision here goes not to prohibiting preference in employment (seniority) based upon Union membership or Union considerations but rather prohibits senority based upon Union representation under a collective bargaining agreement. As the majority of the Board stated, "Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent" (App. 99). And, this is the identical position the Board unsuccessfully took before this Court in *Local 357, Teamsters* v. *NLRB,* 365 U.S. 667 (1961).

In *Local 357, Teamsters* v. *NLRB,* 365 U.S. 667 (1961), this Court overruled the Board's *Mountain Pacific* doctrine [119 NLRB 883 (1958)] where the Board stated that only a hiring hall in accordance with the Board's specific dictates would be legal and any other hiring hall illegal. The Board complained that the grant of work being dependent upon union sponsorship would enhance the union's power and control over employment status and that it would be reasonable to infer that the union would be guided in its concession of employment by an eye toward winning compliance with a membership obligation or union fealty in some other respect. This Court, how-

ever, noted that the hiring hall "is a matter of negotiations between the parties" and in overruling the Board held that proof of actual discrimination was necessary; that proof as regards illegal encouragement of union membership did not mean that which was generated from union representation under collective bargaining agreement. The Court stated that "the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence when a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustment of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well" (pg. 675). The Court found that this was not the type of discrimination that illegally encouraged union membership contemplated in *Radio Officers* v. *NLRB*, 347 U.S. 17, 42, 43 (1954). Thus, as this Court—and in the present case, the Administrative Law Judge—pointed out, "the hiring arrangement (or roster system) (does) not violate the Act unless there is specific evidence of preference because of union membership or similar requirement . . ." (App. 43) (Underlining is that of Administrative Law Judge) emphasizing that "it should be noted as has been stated and will appear again post that there is no requirement of union membership nor was there any requirement of union membership nor any established utilization of the permit system, when in effect, prior to the time at which an em-

ployee achieved the necessary time to be (on the roster). In fact membership was not granted until later and although a permit was utilized for certain purposes, to be detailed, it was not mandatory nor required of a person seeking to be placed on the Union's availability list" (App. 34). And, as previously noted, in a 56-page decision, the Administrative Law Judge analyzed every piece of evidence, resolved questions of credibility and found no acts of discrimination. And to this the Board did not demur but held only that the roster system was *per se* illegally discriminatory as regards the employees of those who did not *de jure* join the Association.

Throughout the proceedings, the Board relied upon its decision in *Whiting Milk Corporation*, 145 NLRB 1035 (1964) in which the First Circuit denied enforcement [342 F. 2d 8, 11 (C.A. 1, 1965)]. In the present case, the Board majority announced that "we respectfully disagree with the court's rationale in *Whiting*" (App. 97, fn. 8). The First Circuit in *Whiting* found that a union and employers may bargain for seniority for employees in the bargaining unit and it did not constitute a violation nor were the parties required to bargain "for similar benefits for employees for whom it had no authority to speak" noting that "If this be an unfair labor practice, on the same reasoning so also would it be an unfair labor practice for a union to bargain for an increase in wages for employees in a unit it represented without at the same time bargaining for an increase in wages for employees in a similar unit it did not represent. The long and short of this case is that the Union bargained for and obtained a benefit for employees in the units it represented. This is not illegal discrimination against employees in other units not represented by the Union but only a normal and

natural incident of union representation. Obtaining a benefit for employees may well encourage others to join the union but that side effect does not violate the Act, for 'The truth is that the union is a service agency that probably encourages membership whenever it does its job well.' *Local 357, International Brotherhood of Teamsters, etc.* v. *NLRB*, 365 U.S. 667, 675-676. . . ." Similarly, the Third Circuit in *Rosen* v. *NLRB*, 455 F. 2d 615, 618 (C.A. 3, 1972), upheld the legality of crediting time for pension benefits of work performed only when covered by the collective bargaining agreement stating that "the Fund provides pension for employees in units represented by the Union. This is nothing more than a natural consequence of union representation; it is not an illegal discrimination of employees represented by the Union, since union and non-union workers participate on an equal basis." And, the Seventh Circuit in *Schick* v. *NLRB*, 409 F. 2d 395 (C. A. 7, 1969), found that a seniority provision in a collective bargaining agreement giving preference to employment derived while working under the union agreement was not arbitrary discrimination based upon past union affiliation and that "Collective bargaining representatives have broad discretion to bargain with respect to seniority rights and this discretion should not be interfered with in the absence of some showing that a change in seniority rights resulted from hostile discrimination" (pg. 399). Clearly then, the court's decision in the instant case is in direct conflict with those on the First, Third and Seventh Circuits all of whose decisions follow this Court's dictates in *Local 357, International Brotherhood of Teamsters* v. *NLRB*.

Myriads of seniority systems exist in our country under collective bargaining agreements and in other facets of

our society. There is nothing magical about seniority, it is man-made and made by agreement of the parties. In unionized industries it is made under collective bargaining agreements. As this Court stated in *Aeronautical Lodge* v. *Campbell,* 337 U.S. 521, 526 (1949), seniority rights "derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry", with, of course, the proviso pointed out in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953) that "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to the interests of all whom it represents." This Court in *Ford Motor* noted that the negotiators had broad latitude in negotiating seniority clauses and that they had "a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." Here, the Union was representing all employees covered by the collective bargaining agreement with "complete good faith and honesty of purpose" in conformance with its statutory obligation to do so. *Humphrey* v. *Moore,* 375 U.S. 335, 349 (1964). Clearly, there is no statutory right to seniority and the Union has no obligation to employees it does not represent but rather it, along with the employers with whom it dealt, exercised its statutory obligation to bargain for the employees it did represent.

The seniority system here was negotiated and designed not only to protect employees covered by the collective bargaining agreement but to recognize the specialized nature of the industry. While protecting the rights of employees under contract, it at the same time permitted the employers unlimited selection within a group and es-

tablished a larger pool from which employers could draw. The contract was not injudiciously drawn. The employers' need for flexibility in obtaining the cameramen possessing the particular artistic skills, special knowledge and temperament to meet the requirements of the particular motion picture production was balanced against the Union's duty to represent the employees covered by the contract and to provide job security for them. Apart from the fact that the Board's decision is legally wrong, if permitted to stand, the disruption in the industry will be incalculable.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Chicago, Illinois
September 13, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-494

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DECISION APPENDIX

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DECISION APPENDIX

TXD-(SF)-73-71
Los Angeles, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA (MPO-TV of California Inc.) and JAMES N. ADLER ON BEHAIF OF JOEL COLMAN and ASSOCIATION OF MOTION PICTURE PRODUCERS, INC. Party to the Contract	Case No. 31-CB-189
INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA (Y-A Productions, Inc.) and VILIS M. LAPENIEKS, An Individual and ASSOCIATION OF MOTION PICTURE PRODUCERS, Inc. Party to the Contract	Case No. 31-CB-198

Earldean V. S. Robbins, Esq., for the General Counsel.

Munger, Tolles, Hills & Richershauser, by James N. Adler, Esq., of Los Angeles, Calif., for the Charging Party, Joel Colman.

Gross and Eisenstein by Edgar F. Gross, Esq., of Los Angeles, Calif., for the Charging Party, Vilis M. Lapenieks.

Bernard M. Mamet, Esq., of Chicago, Ill., and Mr. Doyle Nave, Business Manager of Respondent Union, of Hollywood, Calif., for the Respondent.

Mr. Saul C. Weislow, of Los Angeles, Calif., for Association of Motion Picture & Television Producers,

TRIAL EXAMINER'S DECISION

Statement of the Case

ALLEN SINSHEIMER, JR., Trial Examiner: This proceeding was heard before me in Los Angeles, California on January 27 to 29 and February 1 to 5, 1971 upon a consolidated complaint of the General Counsel and answer of International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, herein called Respondent.[1] The consolidated complaint alleges a viola-

1. The order consolidating cases, the consolidated complaint and notice of hearing issued on September 8, 1970. The original charge in Case No. 31-CB-198 involving Vilis M. Lapenieks was filed January 30, 1967 and the charge in Case No. 31-CB-189 involving Joel Colman was filed December 20, 1966. Paragraph 12 of the complaint was amended at the hearing to add certain additional dates therein. (Rec. p. 742).

tion of Section 8 (b) (1) (A) of the Act by virtue of the interpretation and application of certain "roster provisions" set forth therein and a "tri-local agreement" described therein, which allegedly "have established and given effect to an arrangement, understanding or practice which gives employment preference to individuals based on their having worked for employers signatory to contracts with Respondent and/or IATSE and on their being members of Respondent and/or IATSE." It further alleges specific violations of Section 8 (b) (1) (A) by Respondent causing an employer, MPO-TV of California, Inc., to refuse to hire Colman on or about August 6, 1966 and by Respondent causing an employer to refuse to hire Lapenieks.

Respondent filed both a motion to dismiss predicated on a certain settlement agreement or agreements and an answer. Attorney Gross on behalf of the Charging Party Lapenieks filed a motion to dismiss as to Lapenieks at the hearing, also predicated on a certain settlement agreement or agreements, which motion was denied. These will be considered hereinafter together with the issues raised by the pleadings and during the course of the hearing, which will be specified under the heading "Issues."

Respondent's motion to dismiss made at the hearing with respect to the settlement agreements was denied at the hearing. It was renewed near the close of the hearing. Ruling thereon was reserved and is disposed of below.[2]

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2. Respondent's motion to dismiss the entire case was predicated on the fact that a settlement agreement had been entered into involving Colman and that Respondent had at all times been willing to comply therewith. Briefly, the issue raised results from the execution on June 10, 1968 of separate but identical informal agreements in the Colman and Lapenieks' cases. On July 11, 1968 Attorney Adler on behalf of Colman signed the agreement in Case 31-CB-189 and on October 4, 1968 Lapenieks signed the agreement in Case 31-CB-198. On November 22, 1968

Motions were also made with respect to the application of Section 10 (b) of the Act and to strike certain testi-

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the Lapenieks and Colman agreements were approved by the Regional Director. Both agreements provide among other things that "the Union will make whole Joel Colman and Vilis Lapenieks by payment to each of them of backpay plus interest, such amounts to be determined by the Regional Director in accordance with existing Board formula." By letter dated July 14, 1969 the Regional Director notified Adler that he had determined that Colman was entitled to backpay for only 2 days in the amount of $400 and that this had been made after thorough investigation of Adler's contention that the amount of backpay should be approximately $40,000. On July 18, 1969 in view of the great discrepancy between Colman's backpay claim and the Regional Director's determination, the Charging Party's request (of July 15) for permission to withdraw from the settlement agreement in the Colman case was granted. On August 20, 1969 the Charging Party appealed from the refusal to issue complaint in the Colman case claiming that the determination of the backpay due Colman did not remedy the alleged violation. On December 2, 1969 the appeal was denied by the General Counsel's office. On May 28, 1970 upon the Charging Party's motion for reconsideration a determination was made that the settlement agreement did not adequately remedy the alleged violations of the Act and the appeal was sustained as to the Section 8(b)(1)(A) allegation. On June 22, 1970 the Regional Director informed Respondent that the amount of backpay due Colman was $16,539.63. Respondent refused to pay the backpay in said amount. Following this refusal, on September 4, 1970 approval of both of the Colman and Lapenieks' agreements was withdrawn by the Acting Regional Director and the case was reopened for further proceedings.

Respondent contends that it had posted the notices required, was prepared to comply with the settlement and offered to pay the sum of $400 originally found due by the Regional Director. Respondent states that under established law that the only basis for going behind the settlement agreement would be either that it had not been complied with or that there was a subsequent violation thereof. Respondent's contention herein is that it was in compliance with the settlement agreement it entered into. However, the issue posed here differs from the cases cited in that the Respondent did not pay the amount finally set forth by the Regional Director *after* he allowed the Charging Party to withdraw from the settlement agreement.

Respondent raises two principal contentions: First that the Regional Director exceeded his authority in permitting the Charg-

mony. Ruling was reserved thereon. All motions to strike testimony on which ruling was reserved are hereby denied.

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ing Party to withdraw from the Colman agreement; and, Second that the parties agreed that the Director should determine the amount of backpay, that he had determined the backpay was $400 and that Respondent was willing to make Colman whole in the amount of $400. As the General Counsel points out there is nothing in the Board's Rules and Regulations which prohibits the Regional Director from permitting the Charging Party to withdraw from the Colman settlement. The last part of Section 101.7 of the Board's Rules relating to settlement provides:

> The Regional Office provides Board prepared forms for such settlement agreements as well as printed notices for posting by the Respondent. These agreements which are subject to approval of the Regional Director provide for an appeal to the General Counsel, as described in Section 101.6 by a complainant who will not join in a settlement or adjustment deemed adequate by the Regional Director. Proof of compliance is obtained by the Regional Director before the case is closed. If the Respondent fails to perform his obligations under the informal agreement, the Regional Director may determine to institute formal proceedings. (Emphasis supplied)

From the foregoing it is evident that one requisite is the approval by the Regional Director of the settlement agreement. It is also evident that he is acting as a representative of the General Counsel in so doing. The settlement agreement itself provides that he is to determine the amount of backpay in accordance with Board formula which presumably refers to F. W. Woolworth Company, 90 NLRB 289 (1950) and Isis Plumbing & Heating Co., 138 NLRB 716 (1962). Respondent's contention in essence is if all parties have signed the agreement and the Regional Director is designated to make the backpay determination, that if he makes a determination, that disposes of the matter. In the instant case the Director made the determination, the Charging Party informed him that it did not agree with the determination, and he then allowed the Charging Party to withdraw from the settlement agreement Had the Charging Party not signed the settlement agreement and contended that the amount was in error, there is no question that it would have had a right of appeal to the Board. Similarly had the Charging Party not signed the settlement agreement and had the Regional Director, after investigating the backpay issue determined there was a question of fact and that he could not determine the back pay amount, the Regional Director could have set aside the settlement agreement and issued a complaint.

With respect to the application of Section 10 (b) of the Act, evidence antedating six months of the filing of

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Assuming all parties signed a settlement agreement and no one raised any question but the Regional Director determined the amount of backpay could not be resolved by him on the facts presented what would his position then be? Presumably he could set aside the settlement agreement and proceed to issue a complaint or seek further settlement effort or with the accord of the parties hold a backpay hearing but in any case, he would be exercising his judgment as a representative of the General Counsel. If the Regional Director were to find the amount of backpay to be a very large amount and a Respondent refused to pay, what action could a Regional Director take? Under the rules set forth above, one action that could be taken would be to issue a complaint against a Respondent. In fact if a Respondent doesn't pay under the Board procedures, where there is an informal settlement this is the action that ordinarily would be taken. Were the settlement to provide for a Board order or a court decree of course, a different procedure might be followed. What the foregoing illustrates in my judgment, is that when an informal settlement is involved, the matter remains under the aegis of the General Counsel and his representative, the Regional Director. The informal settlement is a procedural document used by the Board. It is not a contract as such, nor does the Regional Director function as an arbitrator. The Board's consent election proceedings may give the Regional Director a posture more in the nature of an arbiter, but not the informal settlement agreement since the Respondent is not bound by his findings unless the agreement is finally executed and fulfilled. Were the settlement agreement viewed as a contract, since a Respondent is not bound there would be a lack of mutuality until complete performance by a Respondent. Further under contract law, today under the Uniform Commercial Code, generally a contract that would be unconscionable would not be enforceable. Whether or not such would be the case here could depend upon what the amount of backpay might ultimately be ascertained to be. I conclude from the foregoing and also as the General Counsel has pointed out that inherent in the Regional Director's authority to approve a settlement, is the power to reconsider such. See and compare Swift Service Stores, 169 NLRB 359 at 361. See also Jackson Tile, 282 F. 2d 90 at 92 (C.A. 5).

With respect to the contention of Lapenieks at the hearing that his case was separate from that of Colman it may be that had separate forms been executed such would have been true. However, the forms that were executed referred to both Colman and

charges herein will be considered in accordance with the principles enunciated by the Supreme Court in Bryan Mfg. Co., 362 U.S. 411 as subsequently interpreted by the Board.[3]

Upon the entire record including consideration of the briefs filed by the General Counsel, on behalf of the Charging Party Colman, and the Respondent and upon my observation of the witnesses, I hereby make the following:

Findings of Fact

I. Business of Affected Employers

MPO-TV of California, Inc., herein called MPO is a wholly owned subsidiary of MPO Videotronics, with its principal place of business in Los Angeles, where it is engaged in filming television commercials. MPO annually receives revenue in excess of $50,000 from firms located outside California for filming TV commercials for transmission outside California.

Wilding, Inc., herein called Wilding, is a movie producing company with offices and studios in Los Angeles, California, Chicago, Illinois and other cities. During the preceding year in the course and conduct of its business

Lapenieks and therefroe the setting aside of the Colman settlement necessarily involved the setting aside of the Lapenieks' settlement. Respondent contends that the General Counsel in a previous case involving Torbin Johnke had determined that the roster system was not invalid as applied therein. Even assuming that were the case such would not preclude the General Counsel from acting herein. Further the General Counsel's complaint does not attack the roster system per se but as it has been interpreted and applied. I therefore reaffirm my rulings denying Respondent's aforesaid motion to dismiss the complaint and also Lapeniek's aforesaid motion.

3. See for example Houston Maritime Assn., Inc., 168 NLRB 616.

in California, Wilding sold and shipped goods in excess of $50,000 to customers outside California.

Y-A Productions, Inc., herein called Y-A, is a corporation formed solely for producing a motion picture called Young Americans under a contract with Columbia Pictures Corporation, herein called Columbia whereby Columbia agreed to distribute the film nationally and finance the $450,000 cost of production.

Columbia, a corporation with studios located in Los Angeles, California is engaged primarily in the production and distribution of motion pictures. Columbia annually sells and ships from its California studios motion picture film and other products valued in excess of $50,000 directly to the points outside of California.

The parties stipulated that for the purposes of the commerce allegations only, the foregoing facts were true. I accordingly find that MPO, Wilding, Y-A and Columbia are now and at all times material have been employers engaged in commerce and in business affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted that International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of the Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, herein called Respondent, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. The Complaint

The complaint as previously set forth alleges violation of Section 8 (b) (1) (A) by the Respondent. The follow-

ing paragraphs of the complaint are set forth in haec verba:

6. At all times material herein, Respondent and/or its parent body, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, herein called IATSE, and employer members of the Association of Motion Picture Producers, Inc., herein called AMPP, and various independent motion picture industry employers in Los Angeles County, California, including MPO, Wilding, Y-A, and Gerald Schnitzer Productions, herein called Schnitzer, have been parties to separate, but identical, collective-bargaining agreements, covering single employer units.[4]

7. At all times material herein, the collective-bargaining agreements described in paragraph 6 above have contained or incorporated by reference (emphasis supplied) inter alia, the following provisions herein called the Roster provisions:

68. Seniority

a) Maintenance of Industry Experience Roster Producer has established and will maintain an industry Experience Roster of those persons covered by this agreement who in the period between January 1, 1947, and January 31, 1965, both inclusive, have actually worked thirty (30) days or more in one or more of the job classifications covered by this agreement in the production of motion pictures in the Motion Picture Industry in Los Angeles County, or who have been hired in said County and have performed such services outside said County. Additional persons may hereafter be added to such roster in accordance with the procedure set forth under Industry Group 3 below.

****

4. Respondent contends that the unit is a multi-employer unit. There is no dispute that there have been bargaining agreements.

Industry Group 3 of said Industry Experience Roster shall be composed of all persons on such Roster on January 31, 1965 in Industry Group 3. Commencing on and after February 1, 1965, persons not on said Roster who after January 31, 1965 perform all such services in the job classifications covered by this agreement for a total thereafter of at least ninety (90) actual workdays collectively, with more than one Producer engaged in the production of motion pictures in the Motion Picture Industry in Los Angeles County (under a collective-bargaining agreement containing the same seniority provisions as those contained herein) or thirty (30) or more actual workdays with Producer, shall have his work record reviewed by the Producer's "Industry Cameramen Qualifications Committee," appointed by the Association of Motion Picture and Television Producers, Inc. Upon such a review, if such Committee finds that any such person possesses sufficient skill and ability to meet the employment requirement of the Industry, the name of such person may be placed by Producer in Group 3 of said Industry Experience Roster. If such person does not in the opinion of said Committee have the required skill and ability, he shall not be added to the same Roster and such reviewed employment shall not be recognized as experience in the Motion Picture Industry for any purpose under the terms of this agreement. (Emphasis supplied).

****

b) Hiring, Layoff and Rehire

The Producer shall give preference of employment within each of the following applicable related job classifications grouping, respectively, as hereafter provided:

1. Director of Photography and/or 1st or 2nd Cameraman.
2. Portrait Photographer and Still Cameraman.
3. 1st and 2nd Assistant Cameraman.
4. Color Technician.
5. Film Loader.

Such preference of employment in hiring and rehiring shall be given by Producer within each respective related job classification grouping to the available qualified persons who are from such related job classifications, in the following order: First, preference of employment shall be given to such available qualified persons who are in Industry Group 1; second, preference of employment shall be given to such available qualified persons who are in Group Industry 2; then, next preference of employment shall be given to such available qualified persons who are in Industry Group 3. In the event that there are insufficient available qualified persons from such respective related job classifications who are in Industry Groups 1, 2 or 3 to meet the employment requirements of the Producer in such respective related job classifications, then Producer may secure employees from any source.[5] (Emphasis supplied)

8. At all times material herein, Respondent has maintained an agreement with IATSE Local 644 located in New York, New York and IATSE Local 666 located in Chicago, Illinois, herein called the Tri-Local Agreement, which contains the following provisions:

5. These provisions are set forth in Local 659's agreement which was received in evidence.

1. REPORTING OF CREWS: Where a Local desires to have its members work in the territory of a sister Local, notification shall be given in writing by the Union and the members entering the territory of the sister Local shall notify the Local Union upon arriving in the territory.

2. FEATURE PRODUCTION: When two-thirds (⅔) of a production is made in any one of the territories of Local 644, 659 and 666, the crew shall be employed entirely from the Local in whose territory two-thirds (⅔) of the production is to be photographed. (⅔ of a production or less shall be determined by the number of days in the shooting schedule).

3. Where less than ⅔ of a production is made in any one territory of Locals 644, 659 or 666, the Local entering the territory shall be permitted to enter with a First Cameraman,[6] Second Cameraman, Assistant Cameraman and a Still Cameraman, and photograph in collaboration with a First Camerman, Second Cameraman, Assistant Cameraman and Still Cameraman from the Local in whose territory they are working. (Emphasis supplied) Such collaboration must be confined to the city in which the unit is working. (A collaborating crew shall not be confused with a second unit.) The collaborating crew shall work under the immediate direction of the Director of Photography who has entered the territory of the collaborating crew. Screen credit shall be given to the Director of Photography in charge of the collaborating crew.[7]

9. At all times material herein, Respondent and the Employers described above in paragraph 6, have

6. "First Cameraman" and "Director of Photography" are synonymous or equivalent terms.

7. These provisions are set forth in a copy of the Tri-Local Agreement received in evidence.

interpreted and applied the Roster Provisions so as to place on said Roster only those persons who had worked for employers who have collective-bargaining agreements with Respondent and/or IATSE and in accordance with this interpretation, the only workdays counted for the purpose of qualifying for placement on the said Roster are those worked for Employers who are party to such collective-bargaining agreements.

10. Respondent, at all times material, with the acquiescence of the Employers described in paragraph 6 above, has interpreted and given effect to the Tri-Local Agreement so as to permit members of IATSE Local Unions 644 and 666 to work in Los Angeles County as cameramen or directors of photography without regard to the Roster Provisions.

11. On or about August 1, 1966, Respondent through Aller[8] caused MPO to refuse to hire Joel Colman, herein called Colman, for the reason that Colman was not a member of Respondent.

12. On or about August 6, 1966, Respondent through Aller caused or attempted to cause Y-A to refuse to hire Vilis Lapenieks because he was not a member of Respondent.

* * *

15. By virtue of their interpretation and application of the Roster Provisions and the Tri-Local Agreement as described in paragraphs 9 through 14 above, the Respondent and the Employers described in paragraph 6 above, have established and given effect to an arrangement, understanding or practice which gives employment preference to individuals based on their having worked for employers signatory to contracts with Respondent and/or IATSE and on their being members of Respondent and/or IATSE (Emphasis supplied).

8. Rspondent's business agent.

16. The Respondent because of the arrangement, understanding and practice described in paragraph 15 above, through Aller, on or about August 1, 1966, caused MPO to refuse to hire Colman and on or about August 6, 1966, caused Y-A to refuse to hire Lapenieks and by engaging in this conduct did restrain and coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

• • •

28. By the acts and conduct in paragraphs 9 through 12, 15 and 16 above and by each of said acts Respondent did restrain and coerce and is restraining and coercing, employees in the exercise of rights guaranteed in Section 7 of the Act and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

In addition to the foregoing, paragraph IX of the "Standard Basic Agreement" — either between the Association of Motion Picture and Television Producers (herein called "Association") or the Independent Picture Industry Contract (herein called "Independent") and I.A.T.S.E. — provides:

> With respect to employees hired by the Employer to perform services in the County of Los Angeles, California, or hired by the Employer in the County of Los Angeles to perform services outside said county, the Employer shall give preference of employment to persons having experience in the motion picture industry in said Los Angeles County, in the crafts and classifications of work subject to this agreement The definitive term of such preference or seniority shall be those contained in the industry experience seniority roster systems as, by agreements, have been set up and maintained industrywide between Employers on the one hand and the International Alliance and/or the respective West Coast

> Studio Locals on the other hand. In the negotiation and maintenance of such definitive terms, the parties consider, among other things, the length of service of such persons in the motion picture industry in the respective crafts or classifications of work, described in Articles III and IV hereof, and/or as employees of the Employer.

The Respondent admits that the roster system was applied so as to consider only time worked as an employee for signatories to one of these Basic agreements which will be discussed more fully hereafter.

B. The Issues

1. Respondent admits that the roster system requires that the necessary time worked to qualify must have been as an employee for a signatory to a Basic Agreement. Respondent contends that the agreements covered a multi-employer unit and accordingly that such requirements were valid seniority provisions.

2. Respondent further contends that whether or not there were a multi-employer bargaining unit that such (roster) employment preference system was a valid and legal hiring arrangement.

3. The General Counsel contends that there was no multi-employer unit and that an employment system granting preference on the basis of work for signatories was necessarily illegal and violated Section 8 (b) (1) (A) of the Act.

4. The General Counsel, further, contends that in particular instances union membership was a requisite for employment. The General Counsel relies on evidence relating to a permit system, to the employment of Colman, to the employment of Lapenieks, to the employment of Dambacher and to the Tri-City Agreement.

5. With respect to Lapenieks and Colman, there are several questions. First, Respondent contends that both performed supervisory work and that Colman in addition was an independent contractor and therefore not covered by the Act. Second is the question, assuming that Lapenieks and Colman were supervisors, whether the Act would be applicable under the theory advanced by the General Counsel. Third, what were the facts and circumstances with respect to their obtaining or not obtaining employment or a contractual arrangement.

6. With respect to the permit system there may be involved a question as to the application of Section 10 (b) to some of the evidence adduced and a further question is whether or not the record reflects any illegal action or conduct. The same questions arise with respect to Dambacher.

7. The Tri-City Agreement is offered by the General Counsel to establish that members from other cities had preference in employment. Here again there is a question as to just what the agreement involves and how it was applied.

Respondent objected to certain testimony as to Dambacher under Section 10 (b), and as to certain testimony relating to the permit system under Section 10 (b). Respondent also contests the position of the General Counsel as to the application of the Tri-City Agreement. Respondent further contends, as set forth, that Colman and Lapenieks were supervisors and in any event that there was nothing improper with respect to their employment or nonemployment.

C. The Collective Bargaining Relationship and the Roster System

The bargaining relationship and the roster system are set forth together so that the issues as to these can be analyzed and then considered further in the light of the other matters referred to.

IATSE has 22 affiliated local unions in Los Angeles County representing about 16,000 employees engaged in work in the motion picture industry in that area. Local 659, one of its local unions, represents motion picture cameramen. The chief employer association is the Association of Motion Picture and Television Producers, Inc. In 1949 it had seven members. As a result of other employers joining or mergers, in 1964 it had 20 members and at the time of the hearing about 67 members. In addition to the members of the Association there are from 200 to 500 additional employers with whom the IATSE has agreements.

Before negotiations have commenced for a new agreement, IATSE has notified in writing all employers with whom it has had agreements of the commencement of the negotiations. Following is set forth a letter of October 23, 1964 (which is the same as one of October 14, 1960, except for dates specified):

> Gentlemen:
>
> Enclosed herewith is a copy of the "General Proposals" of the I.A.T.S.E. Locals and Basic Crafts as presented to the Association of Motion Picture and Television Producers, Inc. and other producer associations in the Hollywood area.
>
> I am calling your attention to the I.A.T.S.E. Standard Basic Agreement, of which you are a signator, wherein it provides for notice of renegotiations for

wages, hours, working conditions, and etc. as of November 1, 1964. Even though you are operating under the terms of the "Standard Agreements" existing between local unions, the International and members of the Association of Motion Picture and Television Producers, Inc., or members of other motion picture industry associations, you may be interested in what is being proposed.

Matters peculiar to the individual local unions will be negotiated also. If you are interested in these proposals, they will be made available to you, and arrangements made for negotiations, if you so advise. Negotiations are expected to get under way with the Association of Motion Picture and Television Producers, Inc. some time during the early part of November, with the object in view of consummating the agreements with members of the Association on or before January 31, 1965.

If for any reason you should care to negotiate separately before the consummation of agreements between the International Alliance, its locals and the Association of Motion Picture and Television Producers, Inc., consider these as direct proposals to you and inform this office by letter on or before November 2, 1964; otherwise, the final results of the agreements when reached between the I.A.T.S.E. Unions and the Association of Motion Picture and Television Producers, Inc. will be immediately forwarded to you and will become effective as of February 1, 1965.

Sincerely yours,

Zeal Fairbanks

International Representative

According to LATSE Vice President Flaherty, whose testimony is uncontradicted, except for one employer who "went broke," to his knowledge dating from 1954 no in-

dividual employer or group of employers has elected to seek separate negotiations. Accordingly, only one negotiation or negotiations have been conducted as in 1965 when there were representatives of the Association present as well as representatives of an independent association representing 22 to 24 employers and certain nonaffiliated employers. Flaherty further testified:

> Q. (By Mrs. Robbins) In negotiations with the Association of Motion Picture and Television Producers, did the Association ever represent to I.A. in these negotiations, 1965 and any later ones, that it had authority to bind anyone other than its members?
>
> A. No, I don't believe it ever has represented as such.
>
> Q. All right.
>
> A. They refer to other people it's an open door if they want to come in but they never have said they had them bound. We say so but not them.

At the conclusion of negotiations IATSE signs a "Basic agreement," the one with the members of the Association, being called the "Association Basic," which is mimeographed. For convenience the agreement is also printed and mailed out to all the nonmembers of the Association for signature. This printed agreement is called the "Independent Basic." The Association Basic and Independent Basic are identical in almost all respects except for a different method of computing vacation and holiday pay.[9] The reason for the latter is that many of the independent companies are "collapsible" and may not be in existence when time for holiday or vacation arrives. Flaherty testified on examination by the General Counsel:

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9. The Association Agreement also provides for an extra weeks vacation after 10 years, which is not in the Independent Agreement.

Q. (By Mrs. Robbins) As I understand it, in preparing the provisions of this General Counsel's 3, which is the Standard Basic Agreement for Independents, IATSE did not actually negotiate this with any employer but subsequently, after it was printed up on an individual producer basis, the employer decided whether he wanted to be bound by it or not.

A. That's right.

Q. Is that right?

A. He has two copies and he takes one to his attorney and his attorney says it's okay or it's not and they come back, then. If there is anything in there that is not agreeable that we might be able to change, we will work with them but so far, no one has ever found fault with that document.

Then on examination by Respondent, Flaherty stated:

Q. At what point and where are these contracts called the Independent Basic negotiated?

A. As I tried to explain before, they are a copy of the Standard—they are negotiated at the regular negotiations for the major Basic and then for the few spots that are different, our office, Mr. Bernay, normally, at this time, Mr. Chamie and the Producers Association sets down and makes this up so that it will be—That's where they're actually made.

Q. Any changes are actually made with the Association?

A. With the Association.

That prevails in anything that goes on in this industry. But as I said before, this is—each individual who wants this must come up and take it and come back and give their answer whether they accept it or don't.[10]

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10. Carl Stewart, former manager and General Counsel of the Commercial Film Producers Association, testified that some members thereof complained they had not been represented in negotiations for the 1965 contract and were dissatisfied because of no

Article 1 Independent Basic provides:

Either party may by written notice to the other, served on or before November 1, 1968 request negotiation of the 'Wage Scales, Hours of Employment and Working Conditions' as set forth in Article IV hereof; and the preferential hiring or seniority clauses of any agreement in effect between the Employer and the International Alliance and any West Coast Studio Local of the International Alliance as set forth above * * * * or of any other provision of any contract which may be applicable to the Employer by reason of it being effective between such West Coast Studio Locals of the International Alliance and members of the Association of Motion Picture and Television Producers, Inc., Society of Independent Producers, Inc., or members of any Independent Producers Association or Animated Film Producers Association as set forth in Article IV of this agreement * * * If such notice is served the parties agree to commence negotiations within thirty (30) days after such notice is so served concerning the proposals or recommendations set forth therein and continue such negotiations diligently and in good faith otherwise any agreements entered into by the Inter-

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representation and/or nonparticipation. Stewart said several members did not sign the Independent Basic until 1967. At that time IATSE agreed to recognize the Commercial Film Producers Association and negotiate concerning their situation. Stewart said that IATSE later attempted to rescind this recognition agreement but a Commercial Supplement Agreement was reached in 1969. This latter is specifically referred to on page 3 of the Independent Basic of 1969 and incorporated thereto by reference.

Stewart also testified that " . . . it was agreed that at the 1970 negotiations, we could be present and maybe participate but that we would be present as watchers, observers and that we could then participate in the committees but I remember frequently in the negotiations that some member would complain bitterly about the 1965 contract because we had not been represented and had not participated in the framing or the drawing of that Agreement but if you pin me down as to time, date and place, I simply cannot do it."

> national its local unions and the Association of Motion Picture and Television Producers, Inc., and/or Employer Associations shall become effective and binding on the Employer in lieu of such negotiations • • • • The negotiators representing each party in such negotiations shall have power to execute the agreement reached as a result of such negotiations.
>
> It is understood and agreed that if the employer is operating under the terms of the Standard Agreements existing between any local union, the International Alliance and members of the Association of Motion Picture and Television Producers, Inc., Society of Independent Producers, Inc., Animated Film Producers Association and members of any Independent Producers Association, any changes negotiated in such Standard Agreements by the Alliance and its local unions and the Producer Associations shall be effective and apply to the Employer in the same manner as it is effective and applied to the members of these Associations.

Whether or not an employer is a member of the Association, of an independent association or a member of no association, there is one central Health and Welfare Fund for active employees, one central Health and Welfare Fund for retired employees, and one Pension Plan all provided for under the Basic Agreement. In addition, the Basic Agreement provides for a Contract Services, Administration Trust Fund, which is administered by the Association and to which employers pay a specified amount for each hour worked by an employee in the unit. Whether or not an employer is a member of the Association, the monies are administered by the Association for the benefit of all those who sign a Basic Agreement and the employees of such employers and used for establishing and maintaining training programs, safety procedures and the experience Roster systems.

The industry experience roster system came into being on August 10, 1949. Article IX of the Basic Agreement set forth before in the complaint is admitted to be correct as set forth and it spells out the provision therein as in effect for January 31, 1965. Essentially it sets forth classifications in three seniority groups the top Group I must first be exhausted in a particular classification by an employer before he can hire anyone from Group II and similarly he must exhaust any employees in the classification of Group II before he can hire from Group III. If the available employees in Groups I, II or III are exhausted the employer can hire from any source he desires. An individual moves from Group III to Group I after having worked 130 days while in Group III. There is no priority within a group. To obtain roster status an employee must be employed by an employer who is signatory to the Basic Agreement and perform services under that agreement for at least 30 days for a single employer or a total of 90 workdays collectively for more than one signatory employer. Employees who achieve roster status have the time credited to them for work performed with a signatory employer for periods prior to the time the employer became a signatory.

The physical roster is maintained by the Association for all signatories to the agreement regardless of whether or not the employer is a member of the Association. Since 1964 it has tabulated its records by an IBM card system. Ben Batchelder, the administrative assistant to the executive vice president of the Association maintained the rosters from their inception in 1949 until he retired January 1, 1971. According to Batchelder, "When the employee has completed such services the burden of proving such services is on the employee. He is required to obtain

a written statement from his employer or employers as the case may be, certifying that he has satisfactorily completed the required number of days of employment," —30 for a single employer and 90 for a group of employers. Until August 1966 if Batchelder was satisfied with such proof of employment, the employee's name would be entered on the industry experience roster in Group III. On August 1966 the qualifications committee for cameramen, appointed by the Association, started functioning, with its first meeting in August and its next in December 1966. After the committee commenced functioning fully, an employee was required to complete an application form recording his personal employment record and to appear before the committee for an interview. If the committee was satisfied that the employee had performed the required services, he would be physically placed on the roster except that commencing sometime in 1967 there was also a requirement that he pass a physical examination.

Batchelder testified that from the time the qualifications committee commenced functioning in August 1966 until November 1970, 324 cameramen were placed on the roster, and only three were rejected for physical reasons, one for being overweight and the other two for color blindness. Eventually these three were also physically placed on the roster. Batchelder also testified without contradiction[11] that in 1966 during a busy period in the industry, there were many people who had met the work requirements but whose names did not physically appear on the roster. The Association was behind in placing people on the roster because of the adoption of its qualifications committee. Doyle Nave, the assistant business repre-

11. This was corroborated by Doyle Nave, post.

sentative and presently business representative of Respondent, testified that there were employees who had worked for years in the industry who had satisfied the roster requirements but had never physically been placed on the roster, in some instances because the man had not bothered to go down and have his name placed on the roster and in others because of the bottleneck existing in the Association offices.

Because of this and in order to treat everyone fairly, according to Nave, if a man had the required amount of time and had submitted proof through his employer to the Union utilizing substantially the same standards that Batchelder had used, the Union treated the people as having roster status as if their names physically appeared on the roster. According to Nave, whose testimony I am crediting herein (unless otherwise indicated),[12] this was irrespective of whether the man was a member or not or whether he had paid a permit fee or any monies to the Union. Nave testified that membership in the Union had nothing to do with physical placement on the roster. Nave further said that during the years 1965 to 1966 when the Local had from 1150 to 1200 members, approximately "225 people at that time had qualified on the roster as roster status people who in time became members."[13] In April 1966 the Union wrote those whose records indicated they had worked a required amount of time to be placed on the industry experience roster advising them to contact Batchelder concerning physical placement on the roster. And on July 19, 1966, the Union

12. See discussion post.

13. At the same time NABET, the only other union in L.A. County with agreements covering cameramen had only 12 to 15 members in such classifications.

submitted to Batchelder a list of approximately 175 persons whom it considered had acquired roster status but who had not been placed physically upon the roster. Batchelder, however, would not act unless the individual came in personally, made application and then the individual had to wait for the Qualifications Committee Meeting in order to be placed physically on the roster.

According to Nave, if an individual had roster status, irrespective if he was a member of the Union or paid a permit[14] to the Union, he had all the rights and privileges of the roster system.

The Union maintained a list of available persons, but according to Nave's credited testimony,[15] it was not required that a man be a member or have a permit to get on the availability lists nor did the lists show a man was a member or permit holder or neither. According to Nave, the Union maintained a file on each individual which reflected his work record. An individual would call in indicating his availability or leave word on an electronic answering device. The Union maintained availability lists by classification and grouping. When an employer called in to find out who was available, the Union would read the available list for the group and classification, sometimes from the top and sometimes from bottom to give everyone "an equal chance of reading their names off."

According to Batchelder, an employer was not required to call the Union if he knew the individual was available and he could select and hire anyone from the par-

14. The permit issue will be discussed hereafter.

15. I have also noted certain testimony of Emmett Dambacher discussed post and also considered testimony of Vilas Lapenieks, Alex Grasshoff, Joel Colman and Melvin Dellar insofar as such may be related thereto.

ticular group he wanted. According to Nave, employment was effected by the employers who could and did hire persons directly and if the groups were exhausted the employer could hire from any source.

The foregoing indicates that the physical roster was maintained by the employer Association and only it could place a man on the physical roster. It also reflects that as a practical matter an employer, unless he hired a man whom he knew was in Group I (or could so determine from the Association), would in order to be sure of the situation, have to call the Union who maintained the only availability list as to who was working and who was not working. The Union also, as set forth, maintains on its availability list not only those who were physically on the roster at the Association office but those persons whom it considered to have achieved or acquired such roster status. According to Nave, the Union based its so placing of these latter persons on its knowledge of their work for an employer or employers obtained from the employers. Nave testified: "Under the terms of our contract, if they had worked thirty or ninety days, as the case may be, we didn't want to discriminate against these people." Nave also testified that there were eight or nine persons who were not members and did not obtain a work permit (during the time permits were in use) who worked anyway—naming specifically Emmett Dambacher.

Nave further testified that during busy periods there were some employees who had not worked the required days to secure roster status but who had worked for signatories to the agreement and whose names had been submitted by various employers. The Union in connection with its files on individuals, which it kept so that it could determine when and whether an individual had the

required number of days to be placed on the roster made a file on these people. In 1966 the number did not exceed 10 or 12. These names did not appear on the roster nor were they said to be on the roster. However, if the roster was exhausted and an employer asked if the Union knew of anyone, the employer would be given the name of such an individual and would also be told that he did not have roster status. At this point the employer could hire from any source he wanted. None of such individuals on the latter list were members nor did they hold permits in or from the Union.[16]

Qualifications of employees were determined by the employers and the matter of promotion from one classification to another normally determined by the employer. In the event of disagreements concerning the required time to acquire roster status or to be moved into a higher group the Union could complain to the employer and the matter be treated as a grievance. The roster system as set forth applied only to those employers who had signed a collective bargaining agreement with the Union containing identical "seniority" or preference provisions and only as to the employees covered under the particular contract.

D. Contentions as to Multi-employer Unit

Before considering the contentions with respect to effect and application of the so-called permit system which was in effect until March 25, 1967, I will discuss the

16. As will be noted again, the collective-bargaining agreement contains a union shop agreement which coincides with the Roster requirements. In other words an individual, according to the agreement, must become a member after working 30 days for a particular employer or 90 days for a group of employers signatory to the contract, but not before. In fact he does not become a member until later as will be set forth post.

contentions of the Respondent and the General Counsel,[17] as to the type of employer or multi-employer relationship and also as to the validity of the roster system as set forth to this point. The Respondent contends that there is a multi-employer unit and the roster provisions accordingly are valid seniority qualifications and provisions. The General Counsel contends that there is no multi-employer unit involved in the operation of the roster system and that such basis as a predicate for the roster "seniority" or preference provisions is accordingly invalid.

The Repondent contends that even assuming there is not a multi-employer unit that the roster provisions are a proper method and system of hiring or employment under the circumstances herein. The General Counsel contends otherwise.

In support of her contention that there is a multi-employer unit herein the General Counsel cited Gordon Electric Company, 123 NLRB 862. Therein about 160 of 960 signatories were members of an Association or an employer group. The nonmembers signed statements in which they authorized the employer group to act "as my collective-bargaining agent with IBEW Local Union No. 11 and hereby agree to be bound by the terms and provisions of any amendments to this agreement agreed to by IBEW Local Union No. 11 and the N.E.C.A. bargaining representative unless written notice of revocation of authorization in writing is given to the N.E.C.A. and the Union at least 120 days prior to the expiration date of this agreement."

17. The Charging Party's position is similar to the General Counsel's with certain additional contentions relating to prior agreements and their effect, and to certain contentions relative to the meaning of "seniority" which I believe are disposed of by decisions of the U.S. Supreme Court referred to post.

The Board therein held that it was not persuaded that the evidence established that the employer by signing the area agreement and the authorization form "thereby indicated an equivocal intent to be bound in collective bargaining by a group rather than individual action." The Board found "under the particular fact and circumstances of the case, Gordon's conduct amounted at most, to the adoption of an area contract which is insufficient to make an employer part of a multiemployer unit." The General Counsel also points out that to find a multi-employer bargaining unit the Board requires that the employers have expressly or by implication indicated their intention to be bound in collective bargaining by group rather than individual action, citing Rock Springs Retail Merchants Association, 188 NLRB No. 41 (citing cases), and Moveable Partitions, Inc., 175 NLRB No. 149.

The Respondent contends that it has established there is a multi-employer bargaining unit. Respondent asserts that such intention of the employers is manifested by their entering into the Basic Agreement and continuing to accept the negotiations conducted by the Association and the Union. Respondent also contends based on Flaherty's testimony (supra) that the various employers could participate if they so desired. Respondent cites a number of cases some of which involve a history of bargaining and substantial reliance by the Board on this bargaining history and the resultant multi-employer contracts.[18]

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18. International Longshoremens and Warehousemens Union, (Ward's Co. Packing), 160 NLRB 232, and Midas Muffler Clinic, 162 NLRB 775. For the proposition that a formal authorization to negotiate or be bound is not necessary Respondent cites among others N.L.R.B. v. Bagel Bakers Council, 434 F. 2d 884, (C.A. 2, 1970), 75 LRRM 2718 (Affirming in part 174 NLRB No. 101), and N.L.R.B. v. Dover Tavern Owners Association, 412 F. 2d 725 (C.A. 3) aff. 169 NLRB 28.

The General Counsel claims that there is herein merely adoption of an area contract and no manifested intent to be bound by collective group action. Respondent argues that the signatory employers have been told that they could either refrain from the overall unit bargaining and bargain separately or join in the physical negotiations or be bound by results of the one negotiation. Respondent asserts that the contract provides for an employer being bound by group action unless it indicates otherwise.

With respect to the General Counsel's reliance on Gordon Electric, I note that the Board shortly thereafter explained Gordon Electric as in essence limited to its facts and discussed the issue of the intent of the employer in Marble Polishers, Machine Operators and Helpers Local No. 121 AFL-CIO, et al., 132 NLRB 845. In that case the Board said:

> In Gordon Electric, supra, the Board concluded that the mere fact that an employer signs an area agreement previously negotiated by an employer association, is not sufficient to establish an unequivocal intent to be bound by group rather than individual action. Gordon Electric involved one proposition only a determination of what constitutes evidence of unequivocal intent to be bound in collective bargaining by group rather than by individual action.

Analysis of the cases does not provide a square precedent for the situation here involved. However, I do not consider that it is necessary to determine the matter of whether or not the bargaining herein was or was not multi-employer as the issues, in my opinion, can be resolved on another basis.[19]

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19. In view of this I am not considering the effect if any of the Commercial Supplement or any effect of a union authorization election in 1949 on the issue of multi-employer bargaining.

E. Legality of the Roster System

The General Counsel claims that the system as admitted by the Respondent, apart from other evidence to be considered hereafter, is illegal in that it gives preference to employees represented by a union as against employees not represented by a union. The General Counsel also contends, in addition, that union membership is a consideration in employment. The Respondent's position is that the roster hiring system as set forth, is legal. It denies that union membership is a condition for employment.[20] The General Counsel relies primarily on a line of cases involving merger (or consolidation) situations such as N.L.R.B. v. Whiting Milk Corporation, 145 NLRB 1035, enforcement denied 342 F 2d 8, 58 LRRM 2471 (C.A. 1, 1965). The Board declined to acquiesce in the opinion of the Court of Appeals and followed its decision in Whiting Milk, supra, in Woodlawn Farm Dairy, 162 NLRB 48 at p. 49, 50 and also in Teamsters Freight Local No. 480 etc. Hilton D. Wall, 167 NLRB 920 enforced 409 F. 2d (C.A. 6).[21]

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20. At this juncture there is being considered the roster system as it is set forth in the contract. There is also, as will appear hereafter, a difference between the General Counsel (and Charging Party) and Respondent as to the use of the terms "Roster" and "Roster status". The General Counsel appears to limit these to the physical roster kept by the Association while Respondent contends the terms cover all persons who have actually met the work requirements and are entitled to be placed on the physical roster.

21. The General Counsel also refers to N.L.R.B. v. IAM Aeronautical Industrial District, 123 NLRB 627 enf. in certain respects 279 F. 2d 761 (C.A. 9) which involves a different situation from that here since the collective bargaining agreement provided that employees of a production unit represented by the IAM who transferred to other unrepresented units would retain seniority in the production unit as of the date of hire but employees of the

In these cases discrimination against employees not represented by a union in establishing a new or merged seniority list was held to be illegal. Respondent cites the Court of Appeals decision in the Whiting Milk case, supra, which was contra to the Board on the grounds that seniority was a bargainable matter. Respondent also cites Simon Levy Ltd. and Local 572 Teamsters, 181 NLRB 124 where the placing of employees who had been represented by one union, at the bottom of the seniority list when a plant was acquired by, then closed and operations consolidated with those of the acquiring employer whose employees were represented by a second and different union, was held not to be illegal. Credit for seniority purposes was allowed only for the time worked for the acquiring employer whose employees were represented by the second union. Whatever may be the effect of these cases there is no doubt that seniority does not have to be limited to the relative length of employment of respective employees nor based on any precise standard. See Ford Motor Company v. Huffman, 345 U.S. 330 and Humphrey v. Moore, 375 U.S. 335 at 349.

However, the Respondent relies on a different line of cases in support of the validity of its hiring system. This line of cases deals primarily with hiring halls and/or hiring arrangements, but would appear to be pertinent to the arrangement herein with respect to the order in which persons may be employed. In essence the system here

production unit transferred to (other) union-represented units would have seniority only from date of their return to the production units and that such would discourage employees from seeking new union representation upon transfer to other units, in violation of the Act. Neither do I consider Wallace Corp., 323 U.S. 248, 255-56 (1944), referred to by the General Counsel to be determinative of the issues herein.

provides first for a seniority preference roster for persons having worked a certain amount of time for a signatory or signatories. When the "roster" is exhausted the system then allows the employment of anyone regardless of whom they may have worked for and regardless of union membership as will appear more fully hereafter.

It should be noted as has been stated and will appear again post that there is no requirement of union membership nor was there any requirement of union membership nor any established utilization of the permit system, when in effect, prior to the time at which an employee achieved the necessary time to be placed either physically on the roster or was treated as having roster status by the Union. In fact membership was not granted until later and although a permit was utilized for certain purposes, to be detailed, it was not mandatory nor required of a person seeking to be placed on the Union's availability list. Under such circumstances the Board has long held valid hiring arrangements predicated on work time for specified employers where limited to a particular area. These appear to recognize the employment problem created by a situation where employees are not customarily and ordinarily employed continuously by the employer but rather must work on a particular job or project and may work at different times for various employers. In such case some orderly system, which affords both some protection to those working and usually living in the area and some basis of experience appears to be justified. Numerous cases refer to the "area" as constituting a valid basis.

In Bricklayers, Masons and Plasterers International Union of America et al., 134 NLRB 751 the Board affirmed the Trial Examiner who stated:

In his brief General Counsel analyzes the testimony to demonstrate that the criterion for job preference which Furber indicated was membership in the Respondent. However, in doing so General Counsel equates the terms "Erie men" and "local men" with the term "members of Local 28." While it is true that the record discloses that all "Erie men" or "local men" were, in fact, "members of Local 28," nevertheless it does not disclose that Furber, in asking for preference, used the latter term. Osborne and Floryan testified that Furber did not use such a term nor did they understand him to be asking for a preference for the Local 28 members, as such.

In order to accept General Counsel's position it is necessary to conclude that Furber intended by his statement to Floryan and Osborne to obtain a preference based on membership in Respondent, rather than on residence in the area. True, the criterion of residence in the area could only be met by members of Respondent, but I am not satisfied that the coincidence, of itself, would render such a conclusion appropriate. (Emphasis supplied)

The Respondent concedes that it caused the discharge of the two Allens and Smith, but contends that the reason therefor was not their lack of membership in Respondent but their lack of residence in the area and that its conduct based on such motivation was not in violation of the Act. Absent any finding of pretext or sham, I am of the opinion that preferential hiring or job retention based upon an objective criterion such as area residence, particularly in the construction industry, would not be a violation of the Act. (Emphasis supplied).

* * *

The Supreme Court, in Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehouse-

men and Helpers of America (Los Angeles-Seattle Motor Express) v. N.L.R.B., 365 U.S. 667, indicates that discrimination in employment, as such, by employer or union is not outlawed, but that the validity depends on the "true purpose" or "real motive." In the absence of a finding herein that the motive of Respondent was to seek job preference for its members, I do not believe it appropriate to find a violation of the Act, even though Respondent's conduct resulted in a benefit to its members.

I note the Trial Examiner referred "particularly to the construction industry" which was there involved. However, I consider his reasoning and the decision equally applicable to other industries having many employees who do not work continuously for one employer.

In International Marine Terminals, Inc., et al., 137 NLRB 588 a Board panel stated:

> The Respondents are parties to a collective-bargaining agreement which provides for the exclusive hiring of longshoremen through "the Union." The term "the Union," according to the contract, refers to the International Longshoremen's Association, AFL-CIO, and Local 928, International Longshoremen's Association, AFL-CIO. The contract provides for hiring preference in the following order and in the precise terms set forth below:
>
> Group 1. Employees with at least 4 or more years in the longshore-trade in the area, who have passed a journeyman's examination, and have been employed at least one year out of the last 4 years under a contract between their then employer and the Union. (Emphasis supplied).
>
> Group 2. Employees with at least 4 years in the longshore-trade in the area, and who have passed a journeyman's examination. (Emphasis supplied).

Group 3. Employees with at least 2 years experience in the longshore-trade in the area, who have passed a journeyman's examination and who has [sic] has been employed at least 6 months in the last 3 years under a contract between his employer and the Union. (Emphasis supplied).

Group 4. Employees with at least 1 year experience in the longshore-trade in the area and who have passed a journeyman's examination. (Emphasis supplied).

Group 5. All other applicants.

In practice, the Respondent Union established two lists of employees for referral purposes, based on questionnaires distributed to job applicants attending a shapeup. These lists were composed of:(1) Men with 4 or more years' experience on the waterfront; and (2) Men with less than 4 years' experience on the waterfront.

In New York Times case,[1] the Board held that somewhat similar contractual provisions were not unlawful. For the reasons stated in that case, Chairman McCulloch and Member Fanning are of the opinion that the contract criteria for job referral based on past work experience under a union contract are not in the instant case unlawful. Thus the hiring criteria herein, as in the New York Times case, also relate to an appropriate consideration in the selection of employees, namely, experience in the area obtained while working for members of the employer-association involved. Moreover, there is no evidence in the instant case that the required work experience necessarily was obtained under contracts containing union-

1. New York Mailers' Union, Local 6 International Typographical Union, AFL-CIO (New York Times Company, and Publishers' Association of New York City), 133 NLRB 1052.

> security clauses. If it had been demonstrated that the experience in question necessarily had been obtained under contracts containing such clauses, there would be a basis for finding in the present case discriminatory preference for union members (Emphasis supplied).

First I note this case does not include the construction industry. Second. the dicta set forth as to experience obtained under union-security contracts will be considered further hereafter.

In Local Union No. 337, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, 147 NLRB 929 at 930 the Board said:

> As we have held, (citing cases) the Act does not prohibit a union from trying to ease the impact of local employment by excluding workers holding outside jobs, or by attempting to cause employers to limit work opportunities to strictly local applicants.

Another case involving area employment is International Union of Operating Engineers, Local No. 98, AFL-CIO, 155 NLRB 850 at 852 TXD where Trial Examiner Ruckel stated:

> To accept the General Counsel's contention it is necessary to conclude that Mullen intended his statement to Liggett to obtain a preference based on membership in Respondent rather than on residence in the area. While it is doubtles true that the requirement of residence in the area could only be met by members of Respondent, and while Mullen may have used the terms "my local" and "my area" interchangeably, I am not convinced that memebership was the factor in his mind. His reference to "Bosten men" working on the Greenfield project while men in his local were

> out of work, and his corresponding reference to men from Greenfield area (or Local 98) having been bumped off jobs in the "Boston area," persuade me that what motivated Mullen in requesting and obtaining Bavosi's replacement was the fact that he was not from the Greenfield area and that his nonmembership in Respondent was only incidental. The Act and the Board's decisions permit a preference in hiring members of a labor organization where the preference is based on a geographical area. (citing cases) (Emphasis supplied).

A recent case particularly apropos is JM Company, Inc., 173 NLRB No. 227 where the Board affirmed Trial Examiner Foley who found a hiring arrangement analogous to that herein to be a valid one. Trial Examiner Foley stated:

> I find from this evidence that Parker and Pate were discriminated against on January 22, 1968, by being denied recall on that date by Respondent Union, and by being replaced on that date by Respondent Union and hired by Respondent Company. There now remains for disposition the vital question of whether the evidence shows they were discriminated against because of non-membership in the Union and not because they lacked area residence and work experience with contractors signatory or parties to the Contract. If the discrimination was for the latter reason, there is no violation. (Citing Local 357 Teamsters v. N.L.R.B., 365 U.S. 667). (Emphasis supplied).

The legality of the exclusive hiring hall operated by Respondent Union is not in issue. However, illegality does not attach per se to an exclusive hiring hall system operated by a union under a collective-

bargaining contract providing that in connection with referrals by the union a preference shall be given to area residents of 2 years or more in accordance with the extent of their work experience as employees of employers signatory to parties to the collective-barga'ning contract, and providing that no discrimination against persons seeking employment because of membership or non-membership in the union shall be shown by the union either in the maintenance of a referral list or in the referrals for employment, and that the selection of applicants for referral by the union shall not in any way be based on or affected by un'on membership, by-laws, rules, regulations, constitutional provisions, or any other aspect of union membership, policies or requirements. The evidence shows that the exclusive hiring hall operated by Respondent Union is operated under such a collective-bargaining contract. Therefore there is no presumption that the denial by the Respondent Company and Respondent Union, in the operation of the exclusive hiring hall system, of reemployment to nonmembers lacking permanent residence in the area specified in the Contract, and lacking work experience as employees of contractors signatory or parties to the Contract, is on its face discriminatory conduct violative of the Act. The burden is on the General Counsel to prove that the conduct in issue constitutes illegal discrimination. (citing cases) (Emphasis supplied).

I find from the evidence that Respondent Union had a referral list or register containing names of competent operating engineers with 2 years' permanent residence who were either living in the specified area or had left it temporarily with the intention to return, kept current by the re-registration of these engineers on the list or register on the first

> Monday in each quarter of each calendar year. I find that these engineers received a seniority or priority number based on the extent of work experience as employees of contractors signatory or parties to the Contract, and were listed on the register or list in the order of these numbers from lower to higher. I find no evidence in the record that the names were placed on the list or register, or in any order of preference on the list or register, by reason of membership in the Union or in connection with membership in the Union. It may well be that all those registered on the referral list and having seniority numbers were union members since the Contract and prior collective-bargaining contracts had union security clauses requiring membership in the Union after 7 days of employment, or after 30 days prior to the amendment that changed the period for the construction industry to 7 days after employment from 30 days after employment. In any event, if it was the case, it cannot be assumed that the list or register was discriminatory in favor of those having membership in the Union, and against those not having membership in the Union. (Citing cases) (Emphasis supplied)

A like result was reached in International Union of Operating Engineers, Local 302, AFL-CIO, 186 NLRB No. 4 where a contract between the Union and certain chapters of Association General Contractors covered a certain geographical area which coincided with the Union's jurisdiction. The TXD states:

> Section 3 outlines the order of reference, for hiring or rehiring, from an out-of-work list in the following sequence: Group 1, operating engineers "who have been employed by an employer or employers, parties

> to this agreement" who have worked 500 hours or more within a period of 2 years immediately preceding registration date; Group 2, operating engineers with the same qualifications but less than 500 hours employment within the 2 year period; and Group 3 all other applicant operating engineers. (Emphasis supplied).
>
> • • •
>
> "Employers" under this paragraph mean, (1) any employer party to this Agreement, (2) an out-of-town employer who adopts or works under this Agreement and contributes to the health and welfare and/or pension plans, and (3) any employer who employs operating engineers under the terms of this Agreement and is a contributing employer, within the meaning of the health and welfare and pension plans.

And after discussing Section 8 (f) of the Act, continues:

> Respondent urges that a consistent application of a requirement that a registrant on the out-of-work list have prior employment within the geographical area covered by the collective-bargaining agreement between Local 302 and Mountain Pacific-AGC is not violative of Section 8 (b) (1) (A) or (2) of the Act. (Citing cases). I concur. (Emphasis supplied).

While the decision does not indicate whether or not a union security clause was incorporated in the contract it is most unlikely that it would not be.

Although most cases involve the construction industry, as indicated, supra, some do not and I do not believe such to be a distinguishing factor. Also although dicta in the International Marine Terminals, Inc., case, supra, indicated that a union security clause might make a difference in result, I note that it did not affect such in JM Company Inc., supra, nor apparently also in Operat-

ing Engineers Local 302, AFL-CIO, supra. Another difference herein is that although the contracts contain union security clauses, in fact membership is not ordinarily obtained until 2 years after acquiring roster status. (See supra and post).

The foregoing is in my judgment conclusive of the validity of the hiring arrangement (or roster system) which I find would not violate the Act unless there is specific evidence of preference because of union membership or other similar requirement as claimed by the General Counsel which will be examined hereafter.

F. The Permit System[22]

From 1943 to 1967 Respondent issued cards headed "Work Permit" which read: "This is to certify that —— ———— is granted permission to work as ———— from ————." According to Nave and Emmett Dambacher, an employee, it was Respondent's usual practice not to accept a person into membership until he had been a permit holder for about 2 years. According to Nave the permit system was established to give an individual a means of identification, particularly when he went on location outside of Los Angeles County. Nave testified it was customary on location that crafts or other members would ask a man to show some type of identification as to whose jurisdiction the man might be working under. The permit card was used in the same fashion in this respect as a membership card and the amount of the permit fee and service fee equivalent to the amount of dues which were on a graduated scale. According to

22. There is no allegation in the complaint that the permit system was illegal but evidence relating thereto was offered in support of the other allegations of the complaint.

Nave the payment of a permit fee or the acquisition of membership had nothing to do with obtaining or retaining employment. Batchelder, who administered the physical roster system was unaware of the permit system. As previously set forth, according to Nave permits were not issued to an individual unless he had worked the amount of time for a signatory necessary to have achieved roster status which was determined from his employment record. An individual was entitled to a permit if he desired one if he had been so employed. Individual employees asked for permits and after a two year waiting period were granted membership in the Union. According to Nave, as stated, there were seven or eight persons who did not take out work permits including Emmett Dambacher. Dambacher admitted working in 1965, 1966, 1967 without taking out a permit or paying any money to Local 659 until after May 9, 1967 when he became a member. Although Joel Colman, discussed in detail hereafter, started working for Reagan Associates on January 26, 1968 Colman testified he paid no money to the Union until after he had achieved Group I status on July 25, 1968. At that time he paid an initiation fee. Colman said he never had a permit and never paid a permit fee. No one made a demand that Colman be fired or pay dues or permit fees to the Union. However, I note that the Reagan employment was in 1968 and that the permit system had ended in 1967.

According to Nave, the permit cards were not shown or required to be shown to employers nor did an employer call and ask the Union to issue a permit. Neither did a man have to show a permit to work. The Union tried to get men with requisite work time to come in and give the Union the necessary information concerning the amount of days worked and at such time permits would

be issued to them. If the individual refused to pay for a permit, according to Nave no issue was made of it. As long as the men were qualified and had roster status it was their right to work.

The General Counsel contends that the permit holder enjoyed an advantage in the employment market because he was on the Union's availability list which most signatories did not have nor did most of them have a copy of the physical roster, so that for information as to who was eligible under the employment terms of the contract they would turn to Respondent. According to General Counsel, Respondent's assistance came in the form of its availability list which purported to list the persons eligible for employment who were presently available for work. General Counsel contends "however, permit holders as well as persons on the roster are permitted to be listed on the availability list. When an employer calls in to find out who is available the list of persons in the top priority is read to the employer. The list might include permit holders not included on the roster and unless an employer specifically inquired he would not be informed whether the person was or was not on the roster nor in what group the person was." The latter involves an issue which arose throughout the hearing as between the "physical" roster and "eligibility" for the roster. The General Counsel at this point is referring to a physical roster. While the association kept a physical roster, the eligibility requirements are set forth in the contract.

From a contractual standpoint it might arguably be a violation thereof to effect hiring through a list combining the physical roster people with qualified persons eligible to be on the roster, were such to result in hiring qualified and eligible persons not on the physical roster ahead

of persons on the physical roster. In fact except for Dambacher's testimony concerning Cal Roberts discussed, post, there does not appear to be any evidence of such herein.

Further while literal compliance with the contractual provisions for resolving roster status may be requisite thereunder it would seem that if in fact the employees had such eligibility for the roster and were entitled to be on the roster they could be treated as such and employed as such in preference to persons without the qualifications to be placed on the roster. Accordingly insofar as the Union placed employees on its availability list and treated them as the equivalent of those placed physically on the roster there would appear to be only the question of the accuracy of the Union's so placing such employees, that is were these persons entitled to be on the roster. As set forth according to Nave the Union did inquire as to an employee's employment record and kept certain information with respect thereto. Nave said that before a permit would issue the Union required information from an employer that "he had worked for them for a given period of time and the employer felt that in their experience of working with this man that he had qualifications and capabilities and aptitude for this type of work." The period of time was "thirty days or ninety days, whatever the case may be."[23] If the individual was so entitled, it would appear that he could properly be treated accordingly. According to Nave's testimony it does not appear (except for the limited exception noted—fn. 23) that

23. According to Nave, permits were not issued nor permit fees paid until a man acquired roster status with the exception that if a man were going "to go on a job where we could not supply our normal manpower" (a location) and maybe "he'd be gone for two or three weeks and he'd be running into that period of time (to qualify) I think what we would try to do would be to help him as a means of identification, again."

any persons were placed on the Union's availability list in this manner who had not met the contractual eligibility requirements. However, according to Emmett Dambacher[24] he worked with persons not eligible for roster placement who were issued permit cards. Dambacher said when he worked as a grip[25] he worked with a Cal Roberts and a Joe Marquette, Jr., who had never worked 1 day in the industry. According to Dambacher, Joe Marquette told him this and that he got the job because he got a permit from Local 659.

Dambacher also testified " . . . and when I was working for MPO, this occasion would arise."

> There would be an assistant who I had not seen around and I would ask him; in most cases they were very open about it. They would say, "No, I am not on the roster, I am not in the Union. In fact, I do not have time to go on the roster yet but I have a permit from Local 659.
>
> TRIAL EXAMINER: How many such persons were there that told you this?
>
> THE WITNESS: Oh, I don't know, four or five, six, eight.
>
> TRIAL EXAMINER: Did you see their permit cards?
>
> * * *
>
> TRIAL EXAMINER: Well, let us get at this. Who were these people?
>
> * * *
>
> THE WITNESS: Well, I have established that Ron McMannus and Serge Haignere were. I believe

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24. Dambacher started as a "grip" 27 years ago, first worked as an assistant cameraman over 5 years prior to the hearing and was first placed on the cameramen's roster August 23, 1966.

25. A grip is a member of the mechanical crew who Colman said moves the cameras, sets stands, etc.

it came up in Mr. Doyle's testimony that they were listed as on the permit roster. Now, these people were not on the industry roster nor were they members of the Union.

TRIAL EXAMINER: You are saying they were not physically on the roster, is that what you are talking about now?

THE WITNESS: They weren't physically on the roster.

* * *

TRIAL EXAMINER: All right.

Now getting back to the other, who else did you talk to. You mentioned seven, eight or nine people whom you saw working there and you did not recognize them and you asked them how come they were working or something like that.

THE WITNESS: Well, now, all of these was not a card. I mean, some of it was possibly an assumption on my part.

I was working for Jack DeNobi as a crab dolly operator. Matthew Leonetti was on that same case. We were shooting religious programs for television. Doyle Nave came in on the set and asked Matthew if we were going to finish shooting that night and Matthew said, yes.

He said, "Be sure and get your name on the list so that you can get your time in for your thirty days—you know—on your ninety days in the industry," whichever one he said.

Now, I have worked at Schnitzer's where Cal Roberts has told me that he did not have a card nor was qualified to go on the roster, even, but that he had a permit in the Union.

Joe Martinett,[26] I worked with the first, second and third day he ever worked in the industry and he

26. I find no records relating to a Martinett. This may be an error in transcription and probably Joe Marquette, Jr., is intended.

told me that he had to have a card before he could get the job and that he did have a permit in Local 659 before he took his first day's work.

Now, I had no reason not to believe these people. In Joe's case, I had seen his permit.

Dambacher also said Cal Roberts was working at Gerald Schnitzer's as assistant cameraman and he as a grip at a time Dambacher was physically on the cameraman's roster and Roberts was not.

As for persons named above by Dambacher I note first that his testimony either has no probative value or little probative force toward establishing the conclusions asserted by him as to the status of these persons—since essentially predicated on hearsay. Second, as to certain persons and instances specified it is clear they would be outside the 10 (b) period while in other instances it is not evident whether they were within or without the 10 (b) period.[27] Finally wih respect to the persons named, the record reflects Serge Haignere's starting date in Local 659's jurisdiction was 10/15/65 and permit date 12/3/65, membership date 4/26/66 and he went on the physical roster (of the Association) on 8/29/66. Ron Mcmannus' starting date in Local 659's jurisdiction was 10/15/65 and permit date 12/3/65 and membership date 5/1/67 and he went on the physical roster 2/20/67. The record reflects Matthew Leonetti (a loader) started work under Local 659's jurisdiction 10/29/64, received a permit on 7/26/65 and became a member 6/1/67 and is listed on the physical roster as of 2/23/67. As for Cal Roberts and Joe Marquette I note that the names of Herbert C. Roberts and Joe Marquette (together with the names of Haignere, McMannus and Leonetti) appear on a four

27. June 20, 1966 would be the 10 (b) cutoff date.

page list of names submitted as attachment to a letter by Aller to the Association on July 19, 1966 as persons working under union jurisdiction but not on the industry experience roster. Also referred to and accompanying Aller's letter were two draft letters, one undated and one dated April 4, 1966 to Dear Sir advising that the Union believed the individual had met the necessary qualifications, and to ask their employers to furnish the Association necessary information to be placed on the industry experience roster.

Dambacher also asserted that Aller who was at the time business manager of Local 659, sometime in 1965,[28] told him that he had to find his own job and that the Union did not issue permits.[29]

Actually as Nave credibly testified the Union did not maintain a list[30] of nonqualified persons or give permits to such.

The General Counsel asserts "according to Dambacher's undenied testimony after he was placed on the roster he was refused a permit card and told by Nave that he could not use the availability list without a permit." Dambacher also testified as follows:

> Q. Now, Mr. Dambacher, after you were placed on the industry experience roster in August of 1966, did you make another application for membership in Local 659?
>
> A. Yes, I did.

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28. Clearly in any event outside the 10 (b) period.

29. Aller it was agreed by all concerned was so ill that he could not testify at the hearing and this explains his failure to testify on a number of matters.

30. Respondent did at times have some names of persons, who had performed some work it would furnish on request if its available list of qualified persons were exhausted.

Q. All right.

And did you have any conversation with anyone from Local 659 relative to this application for membership?

A. Yes.

Q. All right.

When did you make application for membership?

A. The day after I went before the camera Qualifications Committee, I went to Local 659 and I believe I talked to Mrs. —

Q. Are you referring to Mrs. Burley?

A. Yes.

And I asked for an application for membership in Local 659 and I asked that my name be put on the availability list.

According to Dambacher, Mrs. Burley gave him an application for a permit and he said that he did not want a permit but wanted an application for membership and to be put on the availability list. Dambacher testified Mrs. Burley then called Nave who according to Dambacher told him the policy of Local 659 was to require a permit for a 2 year period and Dambacher would not be able to use the availability list unless he had a permit but that Nave would allow Dambacher to use the availability list until the problem as to permit concerning him was resolved. Dambacher admitted on cross-examination that Nave did give him an electronic telephone recording number so that he could indicate when he was available for work.

Dambacher also testified he had tried to obtain a permit and was refused on a number of occasions after he made application to be on the industry roster in January, 1966 and his appearance before the Camera Qualifica-

tions Committee but could not recall the dates.[31] Dambacher said he did not say he had a job at the times when he went in to see the Union about a permit and added "I don't think it came up whether I was working or whether I was not working."

Nave testified (prior to Dambacher's testimony) on examination by Attorney Adler:

> Q. (By Mr. Adler) Did you not, on occasion, tell persons that they would not receive referral service unless they had a permit?
>
> A. Did I tell anyone that? No.
>
> Q. Did you ever hear anybody else at the Union tell anybody that?
>
> A. No. Permit was not a condition of employment.
>
> * * *
>
> Q. Did you ever hear Herb Aller state to an employee or a person employed in the industry or who was seeking employment in the industry that he, Herb Aller, controlled employment in the industry and he intended to continue to control employment in the industry?
>
> A. Never heard him make that statement.
>
> Q. Did you ever hear him make a statement similar to that?
>
> A. How could he employ a man when the employer is the one —
>
> TRIAL EXAMINER: You have answered the question, Mr. Nave.
>
> THE WITNESS: I was trying to help you.
>
> MR. ADLER: I appreciate that.

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31. The complaint asserts and Dambacher claims that Respondent caused Wilding to let him go on June 14, 1966. Not only is this outside the 10 (b) period but the testimony in support of this is hearsay which as I stated at the hearing I would not use as a basis of a finding.

Q. Were there persons who held permits during 1966 from Local 659 who did not have what you consider roster status?

MR. MAMET: The question has been asked and answered.

A. (By the Witness) Not that I recall.

In any event as set forth, Dambacher did admit that irrespective of whether or not he held a permit or membership he was allowed to use the availability list by calling in, supra. Dambacher further testified:

Q. And not until you became a member, did you pay anything to Local 659?

A. That's correct.

Q. And you never had a permit?

A. That's correct.

Q. And nevertheless, you were on the availability list, were you not?

A. Yes, I did receive one call so I must have been on the list.

Q. Are you disputing the fact that you were on the list?

A. Yes, most of the time. Would you like me to explain that?

Dambacher also admitted his name was submitted to Len Ephraim of Schwitzer Productions even though Nave thought he was a "troublemaker."[32]

I am crediting Nave's testimony with regard to the foregoing first because it is evident Dambacher's testimony was in numerous instances conclusionary rather than probative—such as with respect to the status of

32. In this connection in discussing available personnel, Nave gave Dambacher's name to Ephraim. According to Ephraim with the comment he is a "troublemaker."

persons he worked with and with respect to the permit system and the use of the roster. Second in instances there is variance or inconsistency between direct and cross —although at first asserting he was told he would not be granted the use of the Union's availability list without a permit he admitted he had been given an electronic recording number to call and in fact he had been referred to a job and had worked without a permit or paying fees to the Union. I also observed the witnesses carefully and was particularly impressed with Nave's efforts to respond honestly[33] while both a reading of the record and my observation of Dambacher led me to believe that he felt strongly about matters and was at times accordingly responding with conclusions and assertions.

The General Counsel contends and Nave admitted Respondent requires its members and permit holders to report to Respondent as to when they go on distant location as to the identity of the camera crew and to report if a member of the camera crew has no affiliation with the Respondent. Accordingly, the General Counsel states that "to hold a permit card means a fellow employee will not initiate an inquiry into one's eligibility to work." The General Counsel then adds: "It is clear that for all practical purposes eligibility to work was determined not by the Roster maintained by the Association but by the 'roster maintained by the Union.' " This contention evidently is that the latter was both the fact and illegal. I have previously considered this matter, supra. In addition the Union could be the only one to check on compliance with the contract since the Association, according to Batchelder, had no direct way to check on whether the employers were hiring in accordance with the contract.

33. Wherever I have referred to Nave's testimony herein it is credited unless otherwise indicated.

Only the Union maintained an availability list and only the Union was in a position to check on whether there was compliance with the contract. The employees insofar as they might check and report back to the Local were furnishing information which would enable the Union to police the contract. If the employees knew the individual there would normally be no problem; if they did not, and this was particularly true on location, then there could be a problem of identification. The permit, at least at the time it was utilized, acted to identify the individual, to verify that the Union had checked him out and ordinarily that he had satisfied the Union he met the requirements to be on the roster. As long as the permit was not mandatory to his working on the job, there could be no violation. Nave as set forth testified that there were some seven or eight persons who worked without a permit, including Dambacher. Whatever may have likely been the overall effect of the system involved here and whatever may be likely to result, the Supreme Court has made it clear that there is no per se inference to be drawn from such a situation. See Teamsters Local 357, International Brotherhood of Teamsters, 365 U.S. 667. Accordingly, I find that the permit system, as set forth and analyzed in the record, does not lend support to the General Counsel's contentions as to any claimed violations herein and I do not find any illegal conduct resulting therefrom.

G. The Tri-City Agreement

The Tri-City Agreement involves certain agreements among the locals of the Union with respect to working in one another's territory with the General Counsel contending that this in effect amounted to an exception to the roster system in favor of union members.

The Tri-Local Agreement in part is as set forth in the complaint, supra. There are three cameramen local unions in the IATSE—Local 644 in New York, Local 666 in Chicago and Local 659 in Los Angeles County, with jurisdiction over 13 western states. Local 659 has no agreements with the New York companies who are covered by the 644 agreement. According to General Counsel's witness, Melvin Dellar, in charge of MPO-TV of California and of the West Coast business that might be conducted by MPO Videotronics (located in New York). MPO Video Electronics of New York, a New York corporation, shoots all over the United States. It does not have an agreement with Local 659 but with 644. Local 659 has no control over MPO Video Electronics and the position of the Company is that it is unrestricted in where it operates. According to Nave, if Local 659 has no contractual agreement with the New York employers, an individual coming in from New York has the legal right to work anyplace he pleases. Local 659 attempted to have the New companies sign a basic agreement but apparently without success. Nave testified that the Tri-Local Agreement was designed to protect the respective jurisdictions of each local and the arrangement worked out was that when the members of one local worked in the territory of another no one in the territory in which the work was performed would be displaced and the manpower would be supplied from within that particular territory. Accordingly, although the Union could not control nonsignatories and employees covered by agreements in other territories they would insist that an entire photographic crew come from the territory where the work was being performed so that, while Local 659 could not prohibit New York cameramen from coming in, if the sister local and its members cooperated, they would insist that an entire

crew be hired from the roster. This would be the case even though the New York company brought its own employees, they would be matched man for man from the roster. To police this, the Tri-Local Agreement would require notification to the Union in whose territory the work was being performed by either the sister local or the man coming in. Sometimes a partial crew was brought in or only a director of photography, and a local was asked if anyone was available to fill in the rest of the crew. In this latter event the Local 659 crew would be the entire crew. In some instances the crew or the Company did not report that they were coming in or the Local (659) was unaware of it and would know nothing about the crew working in Los Angeles territory. According to Nave whenever the Local knew of a New York company who brought in a director of photography or crew then Local 659 required a collaborating director of photography and crew if one were brought in or if not hiring a crew from the roster. The Tri-Local Agreement provides that when two-thirds of production is made in any one territory, the local entering the territory shall be permitted to enter with a camera crew and the territory in whose jurisdiction the work is being performed shall put on a full collaborating crew. Nave recalled only one picture when two-thirds was made in New York and the picture was finished in California.

The General Counsel asserts: "the evidence shows that under the agreement cameramen from Local 644 in New York worked for signatories without regard to the roster provision of the collective-bargaining agreement." The General Counsel refers to certain testimony of Nave, Dambacher and Stewart with respect to claimed incidents of cameramen from Local 644 working for signatories without regard to the roster provision. There is some evident

confusion in response to a question relating to standby directors in 1966. Counsel Adler asked Nave:

> Q. (By Mr. Adler) In 1966, were there occasions, to your knowledge when New York cameramen were engaged in production in Los Angeles for an I. A. signatory when there was not a local stand-by director of photography?
>
> * * *
>
> A. Oh, yes. There's been many occasions where they have come out and worked but the I. A. cameraman coming out of New York was working for the New York company in his jurisdiction, but the cameraman that we had here would work on—was on local payroll here.

Nave was also asked about Local 644 directors of photography working in Los Angeles county without standby directors.

> Q. And they worked in Los Angeles county during 1966 and 1967 without stand-by directors of photography.
>
> Is that not true?
>
> A. Not to my knowledge.
>
> Q. You know of no instance in which they worked without a Los Angeles director, without—
>
> A. We caught some that snuck in here without reporting to us and we found it after the fact. This happened. This happened.
>
> Q. You had a report, did you not, from the crew members who were there with any company; would you not know whether there was a director of photography from the information that was phoned in to you?
>
> A. Not necessarily.

Nave was asked about Torbin Johnke (a Local 644 cameraman):

Q. And did you know that Mr. Johnke was employed in the Los Angeles area?

A. We learned of his employment here when we got some records from the health and welfare that his name appeared on the health and welfare benefits, that he was employed by MPO, which was illegal under our contract because he was here on assignment out of New York and unfortunately, he was one of these men coming out of New York previously who had gotten acquainted and been working for MPO.

Nave added "nobody had reported to him that he was back here working . . ., and

THE WITNESS: The only thing I could add is that in order not to cause any disturbance over the fact that they had committed themselves to this man and they had some kind of a contract, I think he was permitted to continue on the assignments that he was on, to finish up the assignment that he was on.

Nave was also asked:

Q. Now, when MPO or any other commercial producer that was a signatory to the I.A. Independent Agreement brought a cameraman from New York to work in Los Angeles and to work with a camera operator and assistant cameraman who were members of Local 659, did you in all instances require a stand-by for that director of photography?

A. Yes.

Dambacher testified as to working in some instances with directors of photography from New York without a collaborating crew. He was unable to state whether the Union was aware of or had checked out these particular instances. This would not necessarily contradict Nave who conceded that there were instances where the Union was unaware of the presence of Local 644 people. Carl Stewart representing the Commercial Film Association testified to a conversation with Aller as follows:

Q. (By Mr. Adler) Mr. Stewart, in your meeting in May of 1968 about which you have testified with Mr. Aller, did he acknowledge that he knew that the members of your Association were bringing in directors of photography from New York and employing them without a standby?

A. Yes.

Q. Did you ever have a discussion with Mr. Aller or any other representative of the I.A. with regard to why producers could employ New York Cameramen but could not employ local non-roster cameramen?

A. Yes.

Q. Do you recall when such discussion took place?

A. At the time we were discussing this Tri-Local Agreement and apparently, it was understood under the terms of the Tri-Local Agreement that New York cameramen could come out here even though we could not hire local cameramen.

Q. Did Mr. Aller explain why you could not hire local cameramen?

A. Because of the experience roster.

* * *

Q. (By Mrs. Robbins) Did Mr. Aller explain why you could use New York directors of photography?

A. Because under the Tri-Local Agreement, apparently, this was an inter-union agreement and somehow was an exception to the experience roster.

Q. Did Mr. Aller say this?

A. Yes.

Q. All right.

A. And there was further conversation to the effect that they had let the members—they had let the New York cameramen come in in violation of the Tri-Local Agreement without hiring standbys but because we had attacked the experience roster, they were going to enforce the Tri-Local Agreement against us.

TRIAL EXAMINER: In what year was this conversation?

THE WITNESS: This was May, June, July, this period in here, after the Pelican—

TRIAL EXAMINER: 1968?

THE WITNESS: Right.

The latter part may be consistent with the testimony of Melvin Dellar (of MPO-TV) who testified that in the period 1958 to 1968 Aller discussed his employment of New York cameramen from time to time, that Aller was aware of such employment either from Dellar or heard it from Local 644. Dellar said in most cases from 1958 through 1968 he did employ a Local 659 standby. He also said "there was a very short time[34] that we did not have to employ a 659 man when a 644 man came into the territory." (Emphasis supplied). Dellar said thereafter they did have to have a standby—that Local 659 required this.

The foregoing indicates an arrangement among the locals to work out a method of adjustment in terms of units that would travel or companies, such as MPO Video Electronics, that had local subsidiaries in California. The fact there may have been some variations from the Tri-Local Agreement does not, in my opinion, nullify the validity of the roster system which was limited to and designed to be protective of employment in the Los Angeles area. There was a general requirement that there be a standby crew or collaborating crew which would work with and/or fill in the New York crew so that there would in essence be fulfillment with the roster requirements. If the New York company operated without the knowledge of the Union or without reference to a signa-

34. The exact period of nonenforcement of the standby requirement is not precise but evidently prior to sometime in 1968—from combining Stewart's and Dellar's testimony.

tory, in such event Local 659 would evidently have no effective means of enforcing the standby (or collaborating) provisions—which it sought to enforce except for a "short period" as set forth above. Accordingly I find no violation of the Act by virtue of the Tri-City Agreement or its application herein.

H. The Allegations as to Lapenieks and Colman

1. Introductory

As to Lapenieks and Colman, the evidence in my opinion will not show anything other than the application of the roster system but I will briefly consider the same. In addition I am finding that both Lapenieks and Colman as directors of photography were supervisors during all times material. Further Respondent contends that Colman was an independent contractor. The General Counsel asserts that the foregoing makes no difference under her theory of the case and cites cases in support thereof. These cases will be analyzed and considered hereafter. Although there is substantial evidence in the record to indicate that Colman was an independent contractor and it may be that such a finding could be made, since I am concluding that both Colman and Lapenieks as directors of photography were supervisors I deem it unnecessary to resolve whether or not Colman was an independent contractor.[35]

35. Some of the "evidence" relating to Colman and Lapenieks may be outside the 10 (b) period but in view of the resolution made hereafter this would not affect any findings or conclusions herein.

2. Supervisory Status of Directors of Photography Colman and Lapenieks

Director of photography Joel Colman testified: "There are usually creatively now, two lines of authority on the set." Colman said one line would be the director and assistant director in charge of talent. Colman was then asked: "Is the director of photography in charge of the mechanical crew?" He answered, "creatively, yes." And said, "Nothing beyond that that I can think of." Colman was also asked:

> Q. Now by creatively, you mean the end result, the image that is secured on the film?
>
> A. Right.
>
> Q. And the director of photography in getting this image is in charge of the camera crew? Is he not?
>
> A. In getting that image, yes.
>
> Q. And in charge of the mechanical crew?
>
> A. Creatively, yes.
>
> Q. Getting the image, getting the end result, is that what we mean?
>
> A. Getting the visual image on film, yes?

Colman was asked whether that included the camera crew and he answered: "Most of the time, yes." He was asked if it included the electrician's crew and answered, "Usually yes." He was asked whether it included the grips and he answered, "Usually yes." Colman was asked: ". . . Is it not true that the director tells the director of photography what results he wants and then the director of photography has to interpret this in terms of what specific instructions he will give to the mechanical crew?" Colman answered, "yes." He was asked if production meetings were held prior to shooting and replied they were. Colman testified that the people in attendance in

production meetings were limited generally to the producer, the director and his assistant, the director of photography and the client and in the case of MPO, Melvin Dellar who was the head of MPO-TV of California. Colman said the director of photography was there for the purpose of obtaining the necessary information so that he can instruct his mechanical crew and get the result. He was asked: "Now as a matter of fact, the director himself never gives any instructions to the mechanical crew, this all comes from the director of photography?"

> A. Speaking of electricians, grips and camera crew, yes.
>
> Q. And the director of photography specifically tells the mechanical crew what he wants them to do?
>
> A. To achieve the effect he's after, yes.

Accordingly under Colman's direction as director of photography were and are the camera crew including an operator cameraman and assistant cameraman who loads the camera, handles the lens and does whatever the director of photography instructs him to do. There are also the grips and the gaffers (head electricians). In an affidavit given to the Board, Colman stated:

> As director of photography, I tell members of the mechanical crew specifically what I want them to do. I do not tell them the result I want and let them determine how to do it. I specifically instruct them what to do. For example I tell the gaffer where I want lights located, the intensity desired, etc. I tell the grips where I want the camera located and the sequence in which the camera location is changed.

Colman was asked if the foregoing and certain other parts of the affidavit were entirely correct. Colman answered: "Yes, I think it is essentially what I was—felt at the time and the answers I gave at the time." Colman

was asked if he had something he wanted to add and responded, "No." He then added "there were other things necessary . . . to give a true picture." At one point Colman sought to minimize his supervisory functions, but after being shown his affidavit it became evident that the director of photography decides and recommends how many assistant cameramen are needed in the production meeting, but may not always get them. He also can recommend who would be on his camera crew. After first stating sometimes his recommendations would be followed and sometimes not, Colman admitted that each time he asked to have someone on his crew in terms of camera assistant when there was an opening, his recommendation was followed "as nearly as I can recall." Colman has selected his own gaffer (head electrician). Colman also said as director of photography he also determines what equipment he will need and what size crew in excess of the minimum and participates in determining how many electricians are necessary. Colman also stated that he recommended a gaffer be discharged in one instance and that although his recommendation was not followed immediately it was eventually.

Dambacher also testified as to the fact that there were the same two lines of supervision including the director and the director of photography. Alex Grasshoff who was a writer producer, director called by the General Counsel also testified that Lapenieks as director of photography had the power and authority to make recommendations with regard to hiring or firing other members of the crew. He was asked by Mr. Adler:

> Q. I think I asked you in making your judgment would you rely upon what you yourself observed while being on the set as a director.
>
> A. Yes, but I would be inclined to take his

recommendation even if I didn't understand it if it related to his job.

Grasshoff testified that the directors of photography direct the camera crew, they tell the camera crew what to do, they direct the grips and the gaffers and that the director of photography was in charge of the camera crew, the grips and the gaffers.

Although Colman tried to make it appear that all he did was related to the creative responsibility and that he didn't have to tell the crews much he conceded that initially he would have to tell them what to do but that eventually they got to know by his grunts and groans what he wanted.

It is clear from the foregoing that the directors of photography ordinarly and in both Colman and Lapenieks' cases, participated in management meetings, directed the work force and instructed crews of cameramen, grips and gaffers in their work. This would be in detail where necessary and less so where the crew was used to the director. Directors of photography are also responsible for the results achieved and can effectively recommend persons for employment or select them for their camera crew and apparently have the power to effectively recommend discharge. Since directors of photography (including Colman and Lapenieks) responsibly direct and assign the work force and can effectively recommend employment, selection and discharge, it is clear and I find that Colman and Lapenieks as directors of photography were supervisors within the meaning of the Act. See Society of Motion Picture and Art Directors Columbia Pictures, et al., 94 NLRB 456 and see also Northwest Publications, 116 NLRB 1578.

3. Qualifications of Lapenieks and Colman to Perform the Work

The position of the General Counsel and the Charging Party is that with respect to Vilis Lapenieks and Joel Colman each was fully qualified to handle and perform the functions of director of photography having had extensive experience with various employers who were not signatories to the contract. For the purpose of this discussion I am assuming that each had requisite technical and professional qualifications for the position.

4. Circumstances Relating to Lapenieks and Colman

All of Lapenieks prior experience was with nonsignatories including about 4 years as staff director of photography for Wolper Productions. In July 1966, according to Director Alex Grasshoff, he told Vice President George Flaherty of IATSE, that Y-A Productions, Inc. was doing a feature documentary called the Young Americans and he wanted to sign an IA(TSE) contract but desired to use a particular cameraman, Lapenieks. Flaherty called Respondent's Business Agent Aller into the conversation. According to Grasshoff, Aller said he didn't want Lapenieks in the IA(TSE), that there were plenty of good cameramen in Local 659. Grasshoff insisted that he wanted Lapenieks as director of photography. Aller at that point said, according to Grasshoff, "Well, I suggest you go out and make the picture nonunion. We don't make any deals here. You either sign an IA contract or you don't." At this point, Grasshoff testified Aller said, "Well, I'll tell you what, I'll make a deal with you, you forget about that fellow Lapenieks and I'll waive any standbys for you in Chicago and in New York." There was a discussion about Lapenieks' work and that apparently ended the conversation. On cross-examination Grasshoff testified:

Q. But the question of following the seniority provisions of the contract had nothing to do with whether a man was in the Union or not, did it? That did not even come up in the conversation?

TRIAL EXAMINER: Which question is he being asked?

A. (By the Witness) Of course, it did. What else? The man is not in the Union, he is not an I.A. member, he is not a card member of the Local 659, therefore, he could not work on my picture. That was the problem.

Q. (By Mr. Mamet) Now, wait a minute. Did Aller tell you that?

A. That's exactly what he told me.

Q. Find it in your affidavit. Find it. Twelve pages. Find where you told this

A. I may not have got into all of that but that's exactly what he said to me.

Q. It is a twelve-page affidavit. Let us see what was said. Find it.

A. I just told you now, I can tell you that's what he said.

First Grasshoff did not claim that his affidavit contained any assertion that Lapenieks couldn't work because he wasn't a union member. Also I note Grasshoff's assertion about not being "in the union," or not a "member." It appears from the testimony that at times reference was made by various witnesses to the term "member" or "Union." Whether these terms were actually said or inferred is one of the questions. For instance Alex Grasshoff, after first appearing to contend that Aller said Lapenieks was not a member of 659, later admitted Aller had

not referred to union or nonunion but this was Grasshoff's interpretation.[36]

Melvin Dellar at one point testified as set forth post he must hire a "member" of Respondent. However, Dellar subsequently admitted he drew the inference that "membership" was required, stating he wasn't too familiar with the roster system. Dellar finally admitted more knowledge of the roster system but said "Roster meant the same to him as membership in the Union," that it was "all one thing to him—that was his conclusion." In these instances

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36. Q. Aller made no reference to the fact that any of the men that he was talking about were Union or non-Union, did he?

A. No, not specifically.

Q. In fact, the only time that Union came up was when you mentioned it and initiated it, was it not?

A. No.

Again, I repeat what he said about Lapenieks: He didn't want this man, this particular man, in the I.A.

Q. But already, you had been told by this man from Columbia that the question of the seniority provisions would not be waived. You understood that when you met with Aller. Is that correct?

A. Yes, I understood that he didn't want this man in the Union. That is, in essence, what I understood.

Q. Now, and you are trying to tell us that this provision here concerning the seniority provisions, when you were told that—Stulberg told you that Aller would not waive the seniority provisions of the contract, that you did not understand?

A. I understood that to mean that he is not letting a non-Union cameraman work on this picture.

Q. But there was nothing that was said that made you understand that. This was your own personal interpretation. Is that correct?

A. That was my interpretation. (Emphasis supplied)

it is clear that witnesses were drawing inferences that were not stated or involved.[37]

Regardless of what Aller may or may not have said, assuming the roster system was lawful there would be nothing illegal in the Respondent's objecting to Lapenieks employment unless he had worked the time necessary to qualify him for the roster. Correspondence occurred involving Gordon Stulberg of Columbia Studios, the financial backer of Y-A Productions with respect to the film and the use of Lapenieks. Between June 9 and 15, 1966, in an exchange of correspondence between Aller and Stulberg, Aller stated that Lapenieks did not meet the roster requirements and that Respondent would not agree to his employment,[38]

In an exchange of communications on August 1 and 5 between Grasshoff and Flaherty, Grasshoff indicated that Y-A would sign an IATSE Basic Agreement but Flaherty stated that IATSE would not sign a collective-bargaining agreement with Y-A if Lapenieks was hired. Grasshoff

37. In this connection Lapenieks said Aller told him since he was not on the industry roster he could not work. Lapenieks said the question of being in or out of the Union did not exactly enter the conversation. Lapenieks said he had not applied for placement on the roster because of "wrong information" that he had to be a member of the Local to get on the roster. Lapenieks said no union representative had ever told him he could not get on the roster unless he were a member.

38. "Your letter of June 8, 1966 was presented to the Executive Board. The finding was to the effect that counsel previously advised us and has repeatedly advised us that all employment of First Cameramen and/or Directors of Photography must be in conformity with the prior preference provisions of the contract. It is our opinion that since the proposed individual in no ways qualifies under the senority provisions of the contract, it is impossible for us to entertain your request."

testified that about August 1[39] in a conversation with Aller he agreed to use a cameraman other than Lapenieks and Aller gave him a list of cameramen including Richard Moore with experience in documentaries. Grasshoff decided to use Moore who informed Grasshoff that he would not be available until August 18. Since production was scheduled to start August 8 Grasshoff tried to find another cameraman. He then contacted Aller and requested Lapenieks be permitted to work until Moore was available. Aller agreed but stipulated that Moore must replace Lapenieks immediately upon Moore becoming available and that Lapenieks not be given any photographic screen credit.[40] On August 22 the first day he was available, Moore replaced Lapenieks, but Lapenieks remained with the production.

According to Grasshoff there was an issue subsequently with respect to Grasshoff asking Moore to permit Lapenieks to handle the camera for a particular scene. Aller telephoned Grasshoff concerning the problem and Grasshoff explained he wanted to use Lapenieks on the camera. According to Grasshoff's initial testimony Aller said, "no you either stick with these people or forget it, we will all walk out." Subsequently on cross-examination Grasshoff said he didn't remember whether Aller said that. Grasshoff admitted saying, "I will drop the picture if he will not allow me to have a particular operator." And that Aller replied "he did not care." According to Grasshoff, about half an hour later Aller called again and said he would make a deal that Lapenieks could operate the

39. It would appear the time would be after that date in view of the dated communications between Grasshoff and Flaherty.

40. According to Lapenieks, reputation in the industry goes up or down according to one's screen credits.

camera and Moore would stay on but Grasshoff would have to agree that Lapenieks would not get any photographic credit. Production continued with Lapenieks as operator until it was completed on September 15, 1966.

Thereafter Lapenieks according to Grasshoff requested that he recommend him for roster placement, on his work for Y-A. Grasshoff said he refused giving as the reason an agreement with Aller "not to sign anything that would enable him to get on the roster." Lapenieks testified that Grasshoff told him that due to a conversation with Aller he would not be given screen credit and he would not try to put Lapenieks on the roster or get him in the Union. However, Grasshoff subsequently denied that he and Aller had a conversation (or an agreement) in which Grasshoff agreed that he would not sign anything that would enable Lapenieks to get on the roster. Grasshoff said he didn't know the significance of his agreement not to give Lapenieks photographic credit. The issue with respect to roster credit, arose after the shooting was completed when Lapenieks requested Grasshoff to give him a letter recommending Lapenieks for roster status and setting forth he had been employed as a director of photography. Lapenieks evidently believed when Grasshoff refused to sign the letter setting forth Lapenieks' experience for roster purposes that this was due to an understanding Grasshoff had reached with Aller.[41] This belief apparently continued until the hearing when Grasshoff testified.

Although Grasshoff at first said that he was unfamiliar with the seniority provisions when he talked with

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41. Lapenieks was later placed in Group I on the roster based on his having had more than 130 days with Wolper Productions, which was not a signatory at the time Lapenieks acquired his qualifying experience but later became a signatory.

Aller he admitted on cross-examination that in an affidavit he gave the Board he said, "On June 8, 1966, I told Stulberg of my conversation with Aller. He wrote Aller a letter concerning our using Lapenieks. Aller's reply was that the Union would not make any exception to the seniority provision of the contract." Grasshoff further admitted that Stulberg told him Aller's reply was that the Union would not make any exception to the seniority provision of the contract. Grasshoff also testified that Aller had told him from the beginning that he would not make any deviation in the contract.

According to Grasshoff, Aller also said:

> THE WITNESS: He said that he did not want this man, Vilis Lapenieks, in the I.A., did not want him on this picture. He said, "He is a troublemaker," and he says, "and besides, between you and me, his work is very amateurish and you don't need him. We have qualified professional people."

As pointed out, supra, at one point Grasshoff appeared to contend that Aller had mentioned that Lapenieks was not a card member of Local 659. This was not in his affidavit and after examining it Grasshoff admitted that Aller made no reference to the fact that any of the men Aller was talking about were union or nonunion and this was Grasshoff's own interpretation as set forth above. Grasshoff further stated that Aller did not even tell him that Moore was a member of the Union.

The General Counsel is contending that Moore was not on the "Roster" and that therefore, insistence on hiring Moore and not hiring Lapenieks was improper and not in accord with the contract. Moore was not on the physical roster but there appears to be no question that he had all of the qualifications for the roster and was so

listed by the Union. In fact Moore had worked under the Union's jurisdiction before 1954 and been a member of the Union since June 1, 1955. Since membership was not achieved until completion of requirements for roster status were fulfilled, Moore was eligible for employment not because he was a member but on the basis of experience that would qualify him for the roster. Under these circumstances I am unable to see where there was any violation with respect to the employment of Lapenieks, if the roster system was valid, which I have so found. In addition, as pointed out, Lapenieks was a supervisor. I accordingly find that the allegations of the complaint relating to Lapenieks have not been proven.

Joel Colman's experience dates from 1954 and during the first 7 months of 1966 he worked in excess of 30 days for Ann Lee Lacy Associates, but none of his employment was with signatories. Colman said that about the end of June or July of 1966 Melvin Dellar of MPO-TV of California asked him about taking a staff position with MPO as a cameraman. According to Colman he said yes and after Dellar contacted New York, they agreed on a figure of $40,000. Dellar said he would be given a 3-year contract but would have to work exclusively for MPO. The details of this so-called arrangement are not being spelled out herein. There is a great deal of conflict as to what the terms were but I do not consider them material to any necessary resolution herein.[42]

Dellar testified without contradiction that he talked to IATSE business representative, Zeal Fairbanks[43] rela-

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42. They would bear on the issue of Independent Contractor and also as to Backpay if such were to arise.

43. Fairbanks is deceased.

tive to using Colman who was a member of NABET, another organization of cameramen, with an IATSE crew. Dellar testified Fairbanks said it would be all right with him but Dellar would have to check with Aller. According to Dellar, Aller said that under no condition could Colman work with an IATSE crew. Dellar offered to hire a member of Respondent for a standby for an assignment scheduled August 4 or 5. Dellar said that Aller refused and said that if MPO used Colman, Aller would pull his people and the balance of the IATSE people off the stage. According to Dellar, Aller further said that Dellar should use a member of Respondent for the August 4 and 5 shootings and Dellar did so. Dellar said he continued to seek Respondent's agreement to the hiring of Colman and assured Colman if the Union withdrew its objections he wanted to hire him. The General Counsel argues that it is clear that MPO would have hired Colman as director of photography except for Respondent's threat to pull its members off the job and that Dellar's undenied testimony should be credited. Although the precise terms of Dellar's "agreement" with Colman for work are in controversy, it does appear that he wanted to hire Colman's services and that the "remuneration" would be predicated on a rate of $40,000 for a year's work. While Dellar testified that Aller told him if he hired Colman, Aller would pull IATSE members off the job, and that he must hire a member of Respondent, the fact is (as set forth supra and post) that subsequently Dellar admitted that he had inferred that the person hired would have to be a union member, but that Aller had not so stated. Dellar, supra, asserted he was not familiar with the roster system and was inferring certain things.

Although Dellar at one point claimed he knew absolutely nothing about the roster provisions of the contract, he

subsequently admitted that in an affidavit given to the Regional Office of the Board on February 10, 1967, he stated:

> In August 1966 I tried to get a waiver from Local 659 so we could hire Joel Colman. If we didn't get a waiver to employ Colman we would have been in violation of the agreement if there were other men on the industry experience roster available.

From the foregoing it is clear that he did know about the roster. Dellar further testified he stated in another affidavit dated December 9, 1966, "when Groups I, II and III are exhausted, Local 659 will, upon request, refer someone to us who is not on the roster apparently from a list of such people that the Union must maintain." After going over his affidavit Dellar admitted that as far as he used terminology, "Roster meant the same to him as membership in the Union." That it was "all one thing." Dellar then added that no one had told him such but it was his own conclusion. Dellar finally admitted that he was no longer certain that Aller had stated that he could not use Colman because Colman was not in the Union, that he didn't remember Aller stating that he could not use Colman but that Aller could have said Colman was ineligible or not on the roster. Dellar also admitted receiving from Jerome Reiner, an attorney, a letter dated September 15, 1966 pointing out specifically the seniority provisions in the roster, the availability status of the persons in the various groups and the fact that any deviation from the roster system would constitute a violation of the agreement. A great deal of testimony is in the record as to the contract and as to Dellar's relationship with Colman, his effort to cooperate with him and his desire to use him. It is sufficient to say that although Dellar's testimony as to conversation with Aller

may not have been contradicted for the reaon of Aller's unavailability that his ultimate examination as set forth above reflected that Dellar had testified as to what he assumed, that he admitted that the term 'member'' was not used and he could not recall precisely what term was used. Dellar also contradicted himself as to his statement that he did not realize there was a roster because it is clear that he did. Predicated on the foregoing it appears evident that what Aller was in essence stating to Dellar was that Colman could not be used because of the roster system and he was not therefore qualified. Whether or not Aller threatened to pull people off or not in this instance I believe is immaterial, because the question is whether or not the Union was seeking to enforce the roster provisions of the contract and if it was so doing the Union would be entitled to oppose Colman's employment. My conclusion is that in essence such was the Union's position predicated upon the roster system. If the system is valid the Union's objection to Colman was valid. I have found the system to be valid and therefore the objection it had to Colman was not illegal." Furthermore, as found above, Colman in my opinion was a supervisor. Accordingly I find that the allegations of the complaint relative to Colman have not been established.

I. Contentions as to Illegality of Actions Involving Lapenieks and Colman as Supervisors if the Roster System as Interpreted and Applied Were Illegal

The General Counsel contends that under certain Board cases that supervisors are equally protected even though not specifically so under the Act because of the impact

44. Subsequently Colman was employed by Reagan Associates, evidently owned by MPO Videotronics. Reagan had a contract with IATSE and Colman did acquire the necessary time to be placed on the physical roster and became a member of Respondent.

on rank-and-file employees. Assuming arguendo that the roster system as applied and interpreted were invalid, the General Counsel argues that even if they were supervisors the position taken against Colman and Lapenieks was improper. The General Counsel says that this action was brought to the attention of the members because a number of the members who were admittedly employees were on the Executive Board when the cases involving Lapenieks and Colman were discussed, and that the charges were also read to members at regular meetings.

General Counsel also contends that the charges relating to Lapenieks and Colman were set forth in articles in "Daily Variety," a publication distributed principally in the Motion Picture Industry in Los Angeles County. It was stipulated that in the 12 months preceding September 29, 1970 the average paid circulation of "Daily Variety" was 13,986 of which 9,351 copies were mailed and 4,635 were delivered to customers or dealers or news vendors in some manner other than by mail. It was further stipulated that on February 4, 1961, 2,916 copies were mailed to subscribers in the County of Los Angeles, (outside the city), 2,730 were mailed to subscribers in the City of Los Angeles, and 1,996 were mailed to subscribers outside the County of Los Angeles for a total of 7,642—so that approximately two-thirds are mailed in Los Angeles County and one-third outside Los Angeles County. It was further stipulated that there was no less than 80 percent of the above circulation in 1967, 1968, 1969 and 1970.[45] Assuming these in fact were read by employees,

45. The parties could not agree on whether or not the bulk of the delivered papers were delivered in the Hollywood area although counsel for Respondent conceded they "all go to Los Angeles County."

which is a matter of inference there would still be the question of how did such coerce employee under the Act? First it would appear that there would have to be found as a necessary inference or assumption that the same treatment would apply to rank-and-file employees as to supervisors. Second it would appear that the truth or falsity of the published allegations would be a material element or consideration. The publication of allegations does not establish the truth of facts. Further the publication would seem to have an equally coercive impact whether true or not. Obviously the mere filing of charges and the publication thereof could not make the Union guilty of violating the Act. The same is true as to the charges being read to members. Additionally, charges relating to supervisors do not necessarily affect rank-and-file employees.

The General Counsel predicates her argument essentially on two Board decisions. Principally the argument appears to be there is one roster system and that the assumption can be made that its application to supervisors would necessarily have impact on rank-and-file employees. The cases cited by the General Counsel are A. O. Smith Corporation, Granite City Plant, 132 NLRB 339 and 393-4 and Reinforced Steel Workers Local 426 (K. G. Marx, Inc.), 164 NLRB 903, which will be analyzed and considered post.

First, the initial cases finding discriminatory action by an employer with respect to supervisors were predicated upon the relationship of supervisors to rank-and-file. Where a supervisor is disciplined for refusing to commit unfair labor practices or take action that would improperly affect the rights of or coerce employees under the Act or where action is taken against a super-

viser for acting as a buffer for employees against improper conduct under the Act, a violation may be found. See for instance Vail Mfg., 158 F. 2d 664 (C.A. 7), where the supervisor refused to be classified as an operator (to assist in defeating organization) or Inter-City Advertising, 89 NLRB 1103 where supervisors refused to aid in a campaign against the Union. In the latter case the Board said:

> As the Trial Examiner has found, the reason for Peeler's discharge was his failure to report to the Respondent the union activities of the nonsupervisory employees under his direction. We believe it reasonable to infer that the Respondent's reason for requiring such reports was to assist it in its campaign against the Union. As we held, with judicial approval, in the Vail case, the discharge of supervisors for refusing to aid in such a campaign unlawfully interferes with, restrains, and coerces the non-supervisory employees involved. Although the Vail case was decided before the amendment of the Act, in our opinion the amendments have made no change in the law in this respect. (Footnotes omitted).

Similarly as to threats or violence to supervisors in presence of employees, in Smith Cabinet, 81 NLRB 886 at 888 the Board said:

> The Respondents further argue that the Board is not warranted in finding that the acts directed against the Company's supervisors violated Section 8 (b) (1) (A) because that Section protects "employees" only. However, we note with respect to the incidents involving Superintendent Simpson and Foreman McKinney, adverted to above, that nonstriking employees witnessed them, or were in the

immediate vicinity at the time of their occurrence. In these circumstances, we find, like the Trial Examiner, that these employees might have reasonably regarded these incidents as a reliable indication of what would befall them if they sought to work during the strike. The coercive effect of such conduct on "employees" within the meaning of the Act is therefore clear. And inasmuch as the illegality of coercive activity directed against supervisors is found to depend upon its commission in the presence of nonstriking employees or under such circumstances as to insure that these employees would hear of it, we shall reject the Trial Examiner's findings with respect to the threats to company officials which were not made in such a context. Accordingly, we do not find, as did the Trial Examiner, that Section 8 (b) (1) (A) was violated by Burger's warnings to the Company's president and vice president that there would be "trouble" if they attempted to bring cars into the plant, and that the windshields of such cars would be smashed. (Footnotes omitted) (Emphasis supplied)

See also N.L.R.B. v. International Woodworkers AFL-CIO (W. T. Smith Lumber Co.), 243 F. 2d 745 (C.A. 5). A. O. Smith and Company cited by the General Counsel involves an action against a supervisor who was a leader in a dissident movement and had sought to protect employees and it was evident employees were aware of the situation. The Trial Examiner stated in part: (132 NLRB 393-4)

The foregoing findings so clearly show that Randolph was demoted by the Company because it was so willed by Herzing, and hence the Boilmakers, that elaborate discussion is needless. The proof is overwhelming that Herzing brooked no interference with

his autocratic reign over the Company's employees, and that he swiftly and unremittingly retaliated with physical assault, threats of economic reprisal, and pressures on the Company against any person, employee, or management representative who deigned to interfere with him. Herzing had marked Randolph for extinction because he regarded him as a leader in the Carpenter's movement and in the dissident group. He resented Randolph's protection of employees from molestations by himself and his lieutenant, Rocky Mayes, and had openly expressed his intention to get him out of the plant. As will be shown, Randolph's demotion in November was a first step leading ultimately to his layoff less than 2 months later. As for the Company's motives for demoting Randolph, it is not necessary to go beyond consideration of Harp's admission in his remarks explaining the demotion to Randolph as a surrender by the Company to pressure from the Boilmakers. This was but another example of the Company's abject capitulation to Herzing's demands at the expense of employee rights, all in the belief that by bolstering Herzing's power in the Boilmakers the Company would gain stability in its plant, and that failure to placate Herzing by appeasing his demands for reprisal against his opponents would lead to resumption of former disorders. In the prevailing atmosphere of the Company's plant it was inevitable that the employees should regard Randolph's demotion as symbolic of what would happen to him if they, in the exercise of their statutory rights, were to oppose Herzing and his ruling group. If Herzing was powerful enough to require the Company to punish a foreman who dared stand up to him, what chance would a plain rank-and-file employee have in a contest with him? The answer

to employees who realized the obvious meaning of Randolph's demotion was that they had no chance. The clear message to them was that protection of their jobs required abandonment of all union activities which would incur Herzing's displeasure. The threat to their job security if they opposed him as demonstrated by his wield of power over the Company to cause Randolph's demotion, was as plain as if the employees were told directly by Herzing that they like Randolph would be similarly punished for resisting him. Union threats to job security of employees, whether by conduct or words spoken directly to them, which are reasonably calculated to coerce employees in the exercise of their rights guaranteed by Section 7 of the Act to continue to abandon their allegiance to the Union, are violative of Section 8 (b) (1) (A) of the Act. (Footnote omitted)

The foregoing illustrates a case of union pressure and demotion of a foreman for his part in a dissident movement and for his protecting employees against union pressure which was found to be obvious to employees by the Trial Examiner.

The Reinforced Steel Workers, supra, in my judgment is not precedent since the Trial Examiner's decision was adopted by the Board because no exceptions were filed. In addition, the factual situation is not comparable to that herein. The Trial Examiner stated:

The employees, both those who were and those who were not members of Local 426, were thus given ample evidence that Respondent's power was such that they could cause a reluctant employer to demote even a supervisor. If the Union was both willing and able to force Marks, who had no contract with Local

426, to hire only members as supervisors, the employees could have little doubt that the Union could and probably would make sure that union membership or a union dobie or permit was a condition precedent to obtaining and retaining a job as a rank-and-file employee.

Furthermore, it is abundantly clear that Respondents first sought to force Marks to get rid of Smith by refusing to allow members of Local 426 to work on the project under Smith and it was only when this tactic failed that Respondents made their direct demands which they enforced by means of a picket line which closed down the entire project. In other words, Respondents' campaign against Smith included direct pressure upon employees; i.e. those members of Local 426 who were prohibited from working for Smith and who clearly were unwilling to work under Smith lest Respondents deprive them, in turn, of jobs on other projects either by seeing to it that they were not hired by union foremen or by refusing to refer them to jobs when employers asked for men.

Thus, when viewed as a whole, Respondents' conduct put employees on notice that Local 426 and Regis O'Brien were determined to remove from the job every man, be he a supervisor or a rank-and-file employee, who was not a member of Local 426 or did not have a dobie or a permit issued by Respondents. To state it another way, Respondents' demands with respect to Smith and with respect to the laborers were so interrelated that the employees would be unable to distinguish between them and would view them as a single act the purpose of which was to

reserve all rested jobs for union members or for men who had the approval of the Union and/or Business Agent O'Brien. Indeed, Respondents' conduct made it clear to members of Local 426 that if they wanted to be hired as foremen, they had to be members of Local 426 or acceptable to Business Agent O'Brien while employees and that Local 426 and Regis O'Brien reward rank-and-file employees who are "good" union members by having them appointed foremen. (Emphasis supplied)

It is evident that the Trial Examiner found the facts to show an interrelationship of pressures on a foreman and employees and that employees were cognizant thereof. Whether or not the Trial Examiner's ultimate conclusion is accepted, the case is clearly distinguishable.

It is clear that whether or not the circulation of Variety and the reading of charges should or can properly be accorded any significance that the impact on other employees and the context situations in the cases cited above were manifestly different from that herein. The witnessing or presence in the immediate vicinity of physical acts of violence against employees in the Smith case is not this case. Neither is it comparable to the involvement, interrelationship and enmeshing of pressures and interests evidently known to all in the A. O. Smith Corporation and the Reinforced Steelworkers Local, cases.

However, with respect to presumptions or conclusions as to coercion or violation which may be drawn from situations, the Supreme Court has passed on such in hiring situations in a number of cases. In the Local 357 Teamsters case, supra, 365 U.S. 667 the Court said there could be no per se presumption of coercion or violation from a hiring hall and that the Board could not adopt

specific standards. A second Supreme Court case is N.L.R.B. v. News Syndicate, 365 U.S. 695. The issue therein was whether under a contract which required that foremen be union members and where the foremen were to do all the hiring, these provisions would necessarily amount to a violation of the Act. The Supreme Court at page 699 stated:

> We also believe the Court of Appeals was right in concluding that the contract on its face is not unlawful even though the foremen—who are union members—do the hiring. In the first place, the contract (unlike the General Laws) does not require journeymen and apprentices to be union members. In the second place, the provisions of the contract which we have set forth make the foremen "solely the employers' agents," as the Court of Appeals concluded. 279 F. 2d at 330. Finally as we said in Teamsters Local 357 v. Labor Board, decided this day, ante, p. 667, we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, "In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." 279 F. 2d at 330. (Footnote omitted).

It would appear, if under the circumstances in the News Syndicate case there is no per se coercion of the persons employed either with respect to union membership or union representation, that the fact of discrimination in hiring of supervisors, even assuming such were brought to the attention of employees, would not per se result in a finding of coercion of employees. In the News Syndicate case it appears evident that the employees would know that the foremen were union members and also that they

did the hiring since they in fact hired them. Yet no finding of coercion therefrom could be made. Accordingly, I conclude and find that the action directed toward the Colman and Lapenieks as supervisors would not constitute a violation under the circumstances even if the roster system (as interpreted and applied) were illegal.[46] The fact that there may be an arguable coercive effect on employees is obviously not sufficient under the News Syndicate decision. I accordingly find no violation of the Act as to Lapenieks or Colman under any allegation of the complaint herein.

The Dambacher Allegations

This brings us to the Dambacher allegations which were referred to in detail, supra. These under the pleadings were not set forth as evidence of a separate violation, but as evidence of motivation. The complaint alleged that "On or about June 14, 1966 Respondent through Nave caused or attempted to cause Wilding to discharge Emmett N. Dambacher, Jr., because he was not a member of Respondent." The time of the alleged incident is clearly not within the 10(b) period for the purpose of any asserted violation but may be considered as "background" in aid of understanding and possibly as bearing on motivation. However, as set forth, supra, footnote 31, the evidence in support of General Counsel's contention that Respondent caused Dambacher to be terminated by Wilding Inc., is predicated on hearsay testimony that Dambacher was told by Jim Sommers, Production Manager (of Wilding) he

46. In view of this conclusion it is unnecessary to consider further the extent of knowledge that could be inferred from distribution of "Daily Variety" nor the effect of the truth or nontruth of the matters published nor whether such could in any case constitute a predicate for finding a violation.

was being let go because Doyle Nave had told Sommers he could not take Dambacher on location and he would have to be replaced. According to Dambacher, Nave gave Sommers a list of people including Serge Haignere and Ron McMannus and Haignere replaced him. First I will not make any finding of fact based on Sommer's asserted statement to Dambacher as to what Nave allegedly told Sommer. Second such does not appear to relate to union "membership." Further as previously set forth it appeared from the Union's record and information that both McMannus and Haignere at the time, although not on the physical roster, had met the requirements for roster status while Dambacher had not. Accordingly I find and conclude that the aforesaid allegation as to Dambacher has not been established.

Conclusions

I have previously found and concluded that the roster system as set forth in the contract and as interpreted and applied insofar as the Respondent is concerned was not illegal, that it was not illegally applied to Colman, Lapeniecks or Dambacher, even assuming Colman and Lapenieks were employees. Further I have found that Lapenieks and Colman were supervisors although reserving any finding as to whether or not Colman was an independent contractor. As supervisors I have concluded and found that even if the roster system was illegal or illegally applied that any action taken toward Lapenieks and Colman did not constitute a violation of the Act. I have also concluded and found that the Tri-City Agreement insofar as it was involved and has been applied was neither illegal nor illegally applied. Finally I conclude and find that the General Counsel has not proven under

the complaint herein any acts in violation of the Act. Accordingly I shall recommend that the complaint herein be dismissed in its entirety.

Conclusions of Law

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding I make the following conclusions of law:

1. The employers referred to herein are employers engaged in and affecting commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. Respondent Union has not engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act as alleged.

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions it is hereby recommended that the complaint in the above matter be dismissed in its entirety.

Dated:

ALLEN SINSHEIMER, JR.,
Trial Examiner.

197 NLRB No.134

D—6203
Los Angeles, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA (MPO-TV OF CALIFORNIA INC., Y-A PRODUCTIONS, INC.)	Case 31—CB—189
and	
JAMES N. ADLER ON BEHAIF OF JOEL COLMAN	
and	
VILIS M. LAPENIEKS, an Individual	Case 31—CB—198
and	
ASSOCIATION OF MOTION PICTURE PRODUCERS, INC. Party to the Contract.	

DECISION AND ORDER

On June 18, 1971, Trial Examiner Allen Sinsheimer, Jr., issued the attached Decision in this proceeding. There-

after, the General Counsel filed exceptions and a supporting brief, and Respondent filed a reply brief, cross-exceptions, and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm only such of the Trial Examiner's rulings, findings,[1] and conclusions as are consistent herewith.

Respondent excepts to the Trial Examiner's finding that the Regional Director did not exceed his authority in setting aside certain settlement agreements and issuing the consolidated complaint. Respondent contends that the Regional Director may not set aside the settlement agreements since there has been no breach of the agreements or a subsequent unfair labor practice.

It has long been the practice in the Board's Regional Offices that before any complaint is issued or other formal action taken the Regional Director affords an opportunity to all parties for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally pre-

1. The General Counsel has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence clearly convinces us that the resolutions were incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

hearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The Regional Office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the Regional Director, provide for an appeal to the General Counsel by a complainant who will not join in a settlement or adjustment deemed adequate by the Regional Director. Proof of compliance is obtained by the Regional Director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the Regional Director may determine to institute formal proceedings.[2]

Pursuant to the above practice, settlement discussions were held in the Regional Office in the instant case, resulting in the execution by the parties, and approval by the Regional Director, of two separate but identical settlement agreements, both of which provided that "the Union will make whole Joel Colman and Vilis Lapenieks by payment to each of them of backpay plus interest, such amounts to be determined by the Regional Director in accordance with existing Board formula." The Regional Director determined that Colman was entitled to backpay amounting to approximately $400. Colman contended that his backpay should be approximately $40,000, and that the Regional Director's determination of the amount of the backpay would not adequately remedy the alleged violation of the Act. Colman's position was ultimately partially sustained, and his backpay recomputed by the

2. National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, Sec. 101.7.

Regional Director to the sum of $16,539.63. When Respondent refused to pay such an amount, approval of both of the settlement agreements was withdrawn.

It appears obvious from the foregoing that there was no meeting of the minds when the settlement agreements were executed. Colman expected to receive a sum far in excess of $400. Respondent expected a liability substantially less than $16,539.63, the amount ultimately computed by the Regional Director. And the Regional Director was apparently faced with uncertainty as to the choice of a formula for making his determination. In such circumstances, we believe that it would be inequitable to hold the parties to the commitments contained in the settlement agreements, and we find that the Regional Director did not commit reversible error in withdrawing approval of the settlement agreements and reopening the case for further proceedings. While settlement agreements are entitled to be treated with sanctity and should not be lightly set aside, we recognize that circumstances can exist which warrant permitting withdrawal from a settlement agreement. Such is the case here.

We do not view the factual situation here as falling within the Board's principle that a Regional Director may not set aside a settlement agreement and issue a formal complaint unless the charged party has failed to comply with its terms or committed further unfair labor practices. As stated above, this is a case where no agreement was reached rather than a case where one was reached and further unfair labor practices committed. And having concluded to proceed to a complaint on the Colman charge, the Regional Director did not abuse his discretion in likewise litigating the issues raised in the Lapenieks charge.

The General Counsel excepts to the finding of the Trial Examiner that the roster system, as interpreted and applied by Respondent, does not violate the Act. A review of the facts convinces us that there is merit to this exception.

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (IATSE) has 22 branches or local unions in Los Angeles County, representing from 16,000 to 20,000 employees engaged in working in the motion picture industry in the Hollywood, California, area. Respondent is one such local union and represents motion picture cameramen.

The chief party whith whom IATSE bargains is the Association of Motion Picture Producers, Inc. (the Association), which currently represents approximately 70 employer-members. In addition to the members of the Association, there are numerous additional employers with whom IATSE bargains.

Prior to negotiations between IATSE and the Association for a new agreement, IATSE notifies all other employers with whom it has expiring collective-bargaining agreements of the commencement of negotiations. These employers are advised of their option either to negotiate separately if they so notify IATSE in writing by a certain date or to be bound by the final understanding reached between IATSE and the Association. As appears below, however, no employer failing to notify IATSE is treated as bound if he chooses not to sign the new agreement.

At the conclusion of the negotiations, each member of the Association signs a single agreement with IATSE called the "Association Basic Agreement" A second

agreement, the "Independent Basic Agreement," is then prepared and is identical to the Association Basic in all essential respects, except for a different method of computing vacation and holiday pay.[3] This agreement is printed and mailed to all prior signatories who are nonmembers of the Association. These employers, after receiving their copy of the Independent Basic Agreement, individually decide whether or not to sign and be bound by the agreement. Those employers who sign this agreement are hereinafter referred to as "Independents."

Negotiations then continue between IATSE, Respondent, and the Association and result in a third agreement, hereinafter referred to as the "Local 659 Agreement." It is this agreement which provides for the Industry Experience Roster, discussed infra, which gives rise to the basic issue in this case.[4] The Local 659 Agreement requires that preference in employement be given to persons whose names appear on this roster. The roster provisions are incorporated by reference in the Association and Independent Basic Agreements.[5]

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3. These differences result from the fact that some companies are "collapsible" in that, when the time comes for an employee to receive holiday or vacation pay, the company may no longer be in business.

4. Although all the aforementioned agreements contain lawful union-security clauses, such clauses are not enforced; indeed, membership is not available until an employee has been on the Industry Experience Roster for a period of 2 years.

5. The Association and Independent Basic Agreements each contain the following provision: " . . . the Employer shall give preference of employment to persons . . . in the crafts and classifications of work subject to this agreement. The definitive terms of such preference or seniority shall be those contained in the industry experience roster systems as, by agreements, have been set up and maintained industry-wide between Employers on the one hand and the International Alliance and/or the respective West Coast Studio Locals on the other hand."

The roster, by agreement, is supposed to be maintained by the Association. However, in practice, employers, when they are in need of cameramen, normally call Respondent, who keeps the roster and list of available employees current.[6]

In determining whether an employee is eligible to be placed on the roster, his work experience with employers other than those who signed one of the aforementioned agreements is not considered. Thus, qualifying experience is generally limited to experience with employers having a collective-bargaining agreement with Respondent and/or IATSE.[7]

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6. At times there have been many individuals who had met the work requirements to be placed on the roster but whose names did not physically appear on the Association's master copy. If an employee had the required experience, Respondent would treat him as being on the roster. When an employer called, Respondent would reach such an individual's name along with those names actually appearing on the roster, providing such persons were currently seeking employment.

7. The roster is divided into groups 1, 2, and 3. Initial placement on the roster in group 3 requires that one have worked 30 days for one signatory or a total of 90 days for several signatories. To move from group 3 to group 1 requires generally that a person work 130 days for signatories. There is no evidence that group 2 has any practical existence.

The Trial Examiner found that experience with an employer prior to the employer becoming a signatory is counted for initial placement on the roster in group 3 when that employer signs a contract wtih Respondent or IATSE. The General Counsel excepts to this finding. According to Ben Batchelder, administrative assistant to the executive vice president of the Association, such experience is counted only for the purpose of reclassification of an employee on the roster from group 3 to group 1. In view of the fact that Batchelder maintained the roster from its inception in 1949 until he retired January 1, 1971, we agree with the General Counsel that such experience is counted only for the purpose of reclassification on the roster.

There can be no doubt that the actions of Respondent in applying the roster restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act. In part, Section 7 gives employees the right to bargain collectively through representatives of their own choosing, or to refrain therefrom, subject of course to majority rule. Respondent's actions penalize employees for having exercised their statutory right to refrain from bargaining collectively through Respondent in the past, while rewarding those employees who have chosen to work in units represented by Respondent.[8]

Respondent contends that the roster provisions, as interpreted and applied, are lawful because the employers, both the Independents and members of the Association, in effect, formed a multiemployer bargaining unit for seniority purposes.

The Trial Examiner considered it unnecessary to determine whether the employers involved constitute a multiemployer unit. We find that they do not, for the evidence shows that the Independent employers did not in fact comprise a part of a single unit for bargaining. Indeed, Respondent admits that the Independents were always given the option to negotiate separately if they desired. Furthermore, the Independents can refuse to be bound by any agreement negotiated by any multiemployer group, simply by not signing the resulting contract. It is not until the Independents have received the proposed agreement and discussed it that each Independent individ-

8. See Teamsters' Freight Local No. 480 (Hilton D. Wall), 167 NLRB 920, enfd. 409 F. 2d 610 (C.A. 6); Whiting Milk Corporation, 145 NLRB, enforcement denied, 342 F. 2d 8 (C.A. 1). Although enforcement was denied in Whiting, we believe the rationale in Hilton D. Wall to be correct, and we respectfully disagree with the court's rationale in Whiting.

ually decides whether or not to become a party to the agreement. In addition, the Association has not been authorized to negotiate on behalf of any Independent employer. Accordingly, we find that the Independents are not part of a multiemployer unit.[9]

Respondent further contends, however, that even if a multiemployer bargaining unit does not exist, there is still no violation of the Act since the seniority provisions are unrelated to union considerations and merely protect the so-called "integrity of the bargaining unit." We find this contention to be without merit.

It is well settled that a bargaining representative for the employees of a particular unit has the right to make seniority depend on the date of hire in the unit and thus to give an inferior seniority ranking to employees transferred from another unit. General Drivers and Helpers Local Union 229, Teamsters (Associated Transport, Inc.), 185 NLRB No. 84.[10] We have heretofore concluded that each Independent employer comprised a separate bargaining unit. We are not faced here with a situation where new employees are being placed at the bottom of a unit seniority list. On the contrary, this case presents a situa-

9. Rock Springs Retail Merchants Association, 188 NLRB No. 41; The Kroger Co., 148 NLRB 569; Van Eerden Company, etc., 154 NLRB 496. See also Moveable Partitions, Inc., 175 NLRB 915, holding that intent to become part of a multiemployer unit cannot be based solely on the adoption by an employer of a contract negotiated by a multiemployer association of which the employer was not a member; there must also be evidence that the employer has authorized the association to negotiate on its behalf.

10. See also Shick v. NLRB, 409 F. 2d 395 (C.A. 7); Ford Motor Company v. Huffman, 345 U.S.330.

tion wherein Respondent prevents an applicant from obtaining initial employment unless he has had prior employment at which he was represented by the Union.

The question here is not what seniority rights an employee acquires after working in a unit represented by Respondent, but what rights the applicant is to start with when he seeks employment with an employer who is party to a collective-bargaining agreement with Respondent and/or IATSE. Respondent admits that if an employee had acquired seniority rights under a collective-bargaining contract to which Respondent and/or IATSE is a party, those rights will be honored where the employee seeks employment in an entirely separate unit which is also represented by Respondent. On the other hand, an employee cannot commence work in a unit represented by Respondent unless he has previously worked in a unit covered by a collective-bargaining contract to which Respondent and/or IATSE is a party. Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent.

The facts relating to the Charging Parties clearly reveal how Respondent's application of the roster violates the Act.[11]

Both Colman and Lapenieks hold the classification of director of photography. When employers MPO-TV and

11. The employee status of both Colman and Lapenieks is discussed infra.

Y-A, who were not members of the Association, sought permission from Respondent to employ these individuals, such permission was refused by Herbert Aller, Respondent's business representative, on the ground that neither individual had acquired the necessary experience to be placed on the roster. In fact, both individuals had extensive experience, albeit it was gained while working for employers who did not have contracts with Respondent and/or IATSE.

With respect to Lapenieks, in July 1966 director Alex Grasshoff told George Flaherty, vice president of IATSE, that Y-A Productions, Inc., was doing a feature documentary, that he desired to sign an IATSE contract, but that he wanted to use Lapenieks as director of photography. Flaherty checked with Aller, who insisted that if Y-A signed a contract, Lapenieks could not be hired since he was not eligible for roster status.

On June 8, 1966, Gordon Stulberg of Columbia Studios, the financial backer of Y-A, wrote Aller and explained the nature of the proposed project and Columbia's financial interest and said that Columbia had informed Y-A that, due to Columbia's obligations under the IATSE agreement,[12] it would finance Y-A's film only if produced under IATSE conditions. Stulberg further explained that Grasshoff considered the teamwork between him and Lapenieks to be essential to the success of the film and that one of the prime reasons Columbia was willing to finance the picture was a previous documentary done by Grasshoff with Lapenieks. In an exchange of letters, Aller remained adamant in his position that Respondent would not agree to Lapenieks' employment.

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12. Columbia Studios is an employer-member of the Association.

Grasshoff finally agreed that Y-A would sign an IATSE basic agreement and also agreed to use a director of photography other than Lapenieks. Aller gave Grasshoff a list of directors of photography, from which Grasshoff could choose whomever he desired. Grasshoff decided to use Richard Moore.[13] Moore later informed Grasshoff that he would not be available until August 18, 1966. Feeling that the production should start as scheduled on August 8, Grasshoff tried unsuccessfully to find another director of photography. He then requested that Aller permit Lapenieks to work until Moore was available. Aller agreed but insisted that Moore must replace Lapenieks immediately upon becoming available[14] and that Lapenieks not be given any photographic screen credit.[15] On August 22, the first day he was available for employment, Moore replaced Lapenieks as director of photography.

Melvin Dellar of MPO-TV of California, an Independent, in August 1966 sought permission from Respondent to hire Colman as a director of photography for a 2-day assignment on August 4 and 5. Aller refused, since Colman was not on the roster, and said further that if MPO used Colman all IATSE people would be pulled off the stage. Colman was not hired for this assignment.

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13. It is worth noting that Moore, although a member of the Union, did not physically appear on the roster. However, Respondent had determined that Moore was eligible to be placed on the roster and treated him accordingly. See fn. 6, supra.

14. It is interesting to note that Paragraph 68 (b) of the "Local 659 Agreement" provides, in part, "In the event that there are insufficient available qualified persons . . . who are in Industry Groups 1, 2 or 3 to meet the employment requirements of the Producer . . . then Producer may secure employees from any source.

15. One's reputation in the industry goes up or down according to one's credits on the screen.

Dellar had been authorized by Arnold Kaiser, president of MPO, to negotiate a contract with Colman for his services as director of photography for MPO. Dellar and Colman reached agreement on a 3-year contract which included a salary of $750 per week, subject to approval by Respondent.

On August 11, 1966, Dellar notified Respondent by letter that he desired to sign the aforementioned contract with Colman and requested that Colman be allowed to become a member of Respondent for this purpose. After receiving no response, Dellar again wrote Respondent concerning this matter. On September 15, Respondent replied that, since Colman's name did not appear on the roster, he could not be hired by MPO.

The above illustrates that initial employment in a unit represented by Respondent is based strictly on union considerations. No matter what qualifications an employee brings with him, if he has not in the past been represented by Respondent, he cannot gain employment with any employer who is party to a collective-bargaining agreement with Respondent and/or IATSE. Accordingly, we conclude that Respondent, by applying the seniority provisions against any Association or Independent employer as if all such employers comprise a single bargaining unit, and in particular by the manner in which Respondent has applied the roster provisions with respect to Colman and Lapenieks, has unlawfully restrained and coerced employees in the exercise of their statutory rights and thereby violated Section 8(b)(1)(A) of the Act.[16]

16. In view of our finding, we deem it unnecessary to consider the effects of the "Tri-Local Agreement" or the "Permit System" discussed by the Trial Examiner.

The Trial Examiner found Colman and Lapenieks to be supervisors. We disagree.

The record reveals no evidence that Lapenieks ever recommended the employment or discharge of any employee or possessed any other substantive indicia of supervisory status. As for Colman, the record shows that on one occasion he recommended that the production manager discharge an employee. But this recommendation was not adopted. Six months later, Colman again requested that this same employee be discharged. This employee was eventually discharged, but the record indicates the discharge was based on an independent investigation by the production manager. The record also shows that Colman, with respect to one employer, was able to recommend employment when a vacancy occurred on his particular crew. But his recommendations were not automatically followed. When they were followed, the final decision was based on the independent judgment of someone above Colman, usually the principal director or the production manager.

We cannot infer from the above that Colman and Lapenieks, as directors of photography, could effectively recommend employment and discharge. It appears that the actual authority was lodged in, and the decisions were effectuated by, others. Recommendations by the director of photography are subject to independent investigations and decision by others.

The Trial Examiner also found that directors of photography responsibly direct the camera and electrical crews. We believe that such direction is only routine since the evidence indicates that the principal director, from whom the director of photography receives all his instructions, is always present to supervise the crews. Under these cir-

cumstances, and in the absence of evidence of any real supervisory authority, we conclude that Colman and Lapenieks are employees under the Act.[17]

Moreover, even if Colman and Lapenieks were supervisors, we would still find the action directed against them by Respondent to be unlawful because of its impact on employees. The record shows that "Daily Variety," a publication distributed principally to employees in the motion picture industry in Los Angeles County, contained articles relating to Respondent's refusal to permit the hiring of Colman and Lapenieks. Furthermore, the action taken against Colman and Lapenieks was brought to the attention of union members who were admittedly employees and who were on the Union's executive board when the action was discussed. In addition, the charges in this case were read to members at regular meetings. It can reasonably be concluded that the discrimination thus directed by Respondent Union created an impact on other employees, the natural consequence of which was to restrain and coerce them with respect to their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.

The Remedy

In order to effectuate the policies of the Act, it is found necessary that Respondent cease and desist from the unfair labor practices found and from any other invasions of the employees' Section 7 rights; take certain affirmative action, including making whole Joel Colman and Vilis Lapenieks with backpay computed on a quarterly basis,

17. In view of our finding, we agree with the Trial Examiner that there is no merit in Respondent's contention that Colman is an independent contractor.

plus interest at 6 percent per annum, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716; and post appropriate notices.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Applying its collective-bargaining contracts with the Association of Motion Picture Producers, Inc., its member-employers, or nonmember-employers outside the Association in any manner which discriminates against any employee with respect to his initial employment and/or placement on the Industry Experience Roster on the basis of union representation.

(b) In any like or related manner, discriminating against employees because of experience gained in the industry while not represented by Respondent.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Notify all employers, against whom it applies the Industry Experience Roster seniority provisions, that it will cease applying such provisions in a manner that discriminates against any employee with respect to his initial employment and/or placement on the Industry Experience Roster on the basis of union representation.

(b) Make whole Joel Colman and Vilis Lapenieks for any loss of pay they may have suffered by reason of Respondent's interpretation and application of the seniority provisions of the Industry Experience Roster, such loss of earnings to be computed in the manner set forth in the section entitled "The Remedy."

(c) Post at Respondent's business offices and meeting places copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Promptly after receipt of copies of the said notice from the Regional Director, return to him signed copies for posting by MPO-TV of California, Inc., Y-A Productions, Inc., all employer-members of the Association of Motion Pictures Producers, Inc., and all other employers against whom Respondent has applied the seniority provisions of the Industry Experience Roster, if they be willing, at their places of business, including all places where notices to employees are customarily posted.

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18. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 30, 1972.

.....
John H. Fanning, Member

.....
Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

CHAIRMAN MILLER, dissenting:

About 4 years ago this case was settled. The settlement agreements were signed by Respondent and Charging Parties and were approved by the Regional Director. The agreements provided for backpay, with the amount to be determined by the Regional Director. He determined the amount to be $400, as to Charging Party Colman. A few days thereafter, Colman asked permission to withdraw from the agreement. For what reason we do not know, the Regional Director permitted him to do so, although Respondent asserts, without contradiction, that it was willing at all times to comply with the agreement.[19]

---

19. A majority of my colleagues find that there was "no meeting of the minds when the settlement agreements were executed." I cannot agree. All parties agreed in writing that the amount of backpay was "to be determined by the Regional Director in accordance with existing Board formula." That, in my view, was a binding agreement, and cannot be vitiated merely because one party subjectively "expected more" than an amount determined by the method to which he had agreed.

In my view the agreement should have been honored and, that being true, the complaint should be dismissed and the settlement agreement reinstated.

We have held in a line of cases going back over the decades and continuing through the years that a Regional Director may not set aside a settlement agreement and issue a formal complaint unless the charged party has failed to comply with its terms or committed further unfair labor practices. See, for example, Corn Products Mfg. Co., 49 NLRB 1377 (1943); Teamsters General Local No. 200, 172 NLRB No. 119 (1968); Mohasco Industries, Inc., 172 NLRB No. 237 (1968); Arrow Specialities, Inc., 177 NLRB 306, 308 (1969).

If a Regional Director may not set aside such an agreement in the absence of lack of compliance or the commission of further unfair labor practices, I see no reason why he may achieve the same result by permitting a charging party to withdraw from the agreement under like circumstances.

We have a very real interest in settling charges, since if it were not for the fact that over 90 percent of such charges are disposed of by settlement and other early methods of disposition at the regional level, this Board would be inundated by such a caseload that we would be totally paralyzed. Considerations of equity also require that a respondent which has in good faith bound itself to a course of complying with such an agreement should be entitled to rely on compliance therewith by the other party or parties, and not be subject to their whim or caprice in deciding to withdraw after a definitive agreement has once been executed. Indeed, if it becomes known that a party cannot rely on such agreements and if instead they are mere will o' the wisps doomed to disappear

at the whim of the other contracting party, how can we expect respondents seriously to consider entering upon settlement discussions?

For these reasons, I would dismiss the complaint and reinstate the settlement agreement.

Dated, Washington, D.C. June 30, 1972.

.....

Edward B. Miller, Chairman
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice and we intend to carry out the order of the Board and abide by the following:

WE WILL NOT apply our collective-bargaining agreements with the Association of Motion Picture Producers, Inc., its employer members, or nonmember-employers outside the Association in any manner which discriminates against any employee with respect to his initial employment and/or placement on the Industry Experience Roster on the basis of union representation.

WE WILL NOT in any other maner restrain or coerce you in the exercise of the right guaranteed in the National Labor Relations Act, which are as follows:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of your own choosing

To act together for collective bargaining or other mutual aid or protection and

To refrain from any and all of these things.

WE WILL make whole Joel Colman and Vilis Lapenieks, with interest, for any loss of pay they may have suffered.

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA

(Labor Organization)

Dated ..... By .....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213—824-7352.

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 72-1759 September Term 1972

International Photographers of the
Motion Picture Industries, Local 659
of the International Alliance of
Theatrical Stage Employees and
Moving Picture Machine Operators of
the United States and Canada, Petitioner

v.

National Labor Relations Board

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Bazelon, Chief Judge, Wisdom, *United States Circuit Judge for the Fifth Circuit, and Wilkey, Circuit Judge.

ORDER

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel. On consideration of the foregoing, and for the reasons set forth in the attached memorandum, it is

ORDERED AND ADJUDGED by this Court that the aforesaid petition for review is denied and it is

FURTHER ORDERED that the cross-application for enforcement of the order of the National Labor Relations Board is granted.

Per Curiam

For the Court

HUGH E. KLINE,
Clerk.

*Sitting by designation pursuant to 28 U.S.C. § 291 (a).

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Filed April 27, 1973.

HUGH E. KLINE,
Clerk.

Memorandum

The Board properly refused to give effect to the aborted settlement agreements between the charging parties and the respondent.

A finding of a section 8 (b) (1) (A) violation does not require actual proof of intent to influence the exercise of section 7 rights. The Board's inferences concerning the "natural foreseeable consequences of the conduct" were adequately supported by the record. See Lummus Co. v. NLRB, 339 F. 2d 728, 734 (D.C. Cir. 1964). See also Teamsters Local 357 v. NLRB, 365 U.S. 667, 675 (1961); Radio Officers' Union v. NLRB, 347 U.S. 17, 51 (1954).

Accordingly, the petition for review is denied and the cross-application for enforcement is granted.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 72-1759

JUDGMENT

Before: BAZELON, Chief Judge, WISDOM, *United States Circuit Judge for the Fifth Circuit, and WILKEY, Circuit Judge.

THIS CAUSE came on to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated June 30, 1972, against International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, its officers, agents, and representatives. The Court heard argument of respective counsel on April 16, 1973, and has

considered the briefs and transcript of record filed in this cause. On April 27, 1973, the Court being fully advised in the premises, entered an Order denying the petition to review and granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that the above-named Petitioner, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

DAVID BAZELON,
Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

JOHN MINOR WISDOM,
Circuit Judge, United States Court of Appeals for the Fifth Circuit.

MALCOLM WILKEY,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Filed June 21, 1973.

HUGH E. KLINE,
Clerk.

SUPREME COURT, U.S.
Supreme Court, U. S.
FILED
SEP 28 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-494

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-494

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This *amicus curiae* brief of the Association of Motion Picture and Television Producers, Inc. is filed pursuant to Supreme Court Rule 42, with the written consent of all parties, filed concurrently herewith with the Clerk of this Court.

Statement of Interest of Amicus Curiae.

The members of the Association of Motion Picture and Television Producers, Inc. (hereinafter called "Association")[1] are employer parties to the "Standard

[1]When this case arose, the Association's name was Association of Motion Picture Producers, Inc. The present name came about after the merger with an association representing employers in the television industry.

Basic Agreement" with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter called "IATSE") and the collective bargaining agreement with the IATSE and International Photographers of the Motion Picture Industries, Local 659 of the IATSE (hereinafter called "Local 659"). The industry experience roster provisions of these agreements give rise to the basic issue presented by this case (App. 95).

In addition, the members of the Association are parties to numerous other collective bargaining agreements, containing similar industry experience roster provisions, with the IATSE and its local unions and with other labor organizations representing employees in the motion picture and television industry, which are affected by the determinations made in this case. At stake here is, therefore, the interpretation and application of the entire Industry Experience Roster System in the motion picture and television industry in Los Angeles County, California—the cradle and heartland of this industry in the United States.

These vital interests have prompted the Association to file this *amicus curiae* brief in support of the Petition for a Writ of Certiorari. The brief is addressed solely to the second question presented for review.

Amicus curiae will not burden the record with a separate Statement of the Case. Instead, reference to pertinent facts will be made in the argument when appropriate.

ARGUMENT.

REASONS FOR GRANTING THE WRIT AS TO THE SECOND QUESTION PRESENTED FOR REVIEW.

I.

Preliminary Statement.

The second question presented for review is as follows:

> "May the National Labor Relations Board hold that industry seniority employment benefits, in the motion picture industry, obtained under an admittedly otherwise legal collective bargaining agreement, represent illegal encouragement of union membership under the National Labor Relations Act solely because the computation of seniority relates to time worked under such agreement in the face of detailed findings by the Administrative Law Judge, undisturbed by the Board, that employment and employment seniority were not based upon union membership or like considerations." (Pet. 2-3.)

This question clearly meets the considerations outlined in Supreme Court Rule 19 for the grant of *certiorari*. The question presented is an important question concerning the application of the National Labor Relations Act, as amended, and particularly of Section 8(b)(1)(A) (61 Stat. 140, 29 U.S.C. 158(b)) of the Act which vitally affects not only the labor relations of the entire motion picture industry but as well the labor relations of other important industries such as, for instance, the trucking industry.

The decision of the Court of Appeals (App. 113), enforcing the Board's order in this case, is in direct conflict with the decision of the Court of Appeals for

the First Circuit in *N.L.R.B. v. Whiting Milk Corporation*, 342 F. 2d 8 (C.A. 1, 1965), denying enforcement of the Board's order in *Whiting Milk Corporation*, 145 NLRB 1035 (1964), which in turn conflicts with the later decision of the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Teamsters Local No. 480*, 409 F. 2d 610 (C.A. 6, 1969), enforcing, without opinion, the Board's order in *Teamsters' Freight Local No. 480 (Hilton D. Wall)*, 167 NLRB 920 (1967). Additionally, the decision of the Court below is at least conceptually in conflict with the decision of the Court of Appeals for the Third Circuit in *Rosen v. N.L.R.B.*, 455 F. 2d 615 (C.A. 3, 1972).

Alternatively, if the decisions cited above were not to be viewed as conflicting with the decision of the Court of Appeals in the instant case, it follows *a fortiori*, that the question presented is an important one which has not been but should be settled by this Court.

II.

The Importance of the Question Presented Far Transcends the Interests of the Parties to the Dispute.

The determination of the question presented is not only vital to the administration of the industry experience roster system in the motion picture and television industry which, for almost a quarter of a century (App. 23), has provided a highly skilled labor pool for a seasonal and fragmented industry consisting now of some seventy members of the Association and hundreds of emerging and disappearing independent motion picture and television producers (hereinafter called "Independent") (App. 17, 94-95).

The Industry Experience Roster provisions,[2] state that experience shall be credited if it was obtained while working "under a collective bargaining agreement containing the same seniority provisions as those contained herein" (App. 10). These provisions are designed to establish an industry-wide pool of qualified persons in the classifications of the trade who have had comparable work experience (App. 10-11), have passed the same review by a qualifications committee appointed by the Association (App. 24) and have passed the same physical examination (App. 24).

This pool is designed to serve the needs of the entire industry—members of the Association and nonmembers alike. Association members as well as Independents contribute on the same hourly basis to the Contract Services Administration Trust Fund to finance maintenance of the roster system (App. 22). The roster is mainatined by the Association for signatory employers to the agreements irrespective of membership in the Association (App. 23). Thus there is a single skilled labor pool created and maintained for employers to draw on. The needs of each of these employers typically fluctuate dramatically and in many instances the lifespan of an employing company is limited to the production of a single motion picture or even a single television pilot episode. Employees consistently and constantly move from employer to employer based upon current employment opportunities and without any regard to whether or not the employer is a member of the Association.

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[2]The Industry Experience Roster provisions are contained in the "Seniority Provisions" of the agreement with Local 659 (App. 9-11) and are incorporated by reference in the Association and Independent Basic Agreements (App. 95).

There are many other provisions of the collective bargaining agreements which recognize the economic facts of life that the industry cannot operate without a single labor pool and that an artificial partitioning of the work force into a group consisting of those employees who momentarily happen to work for members of the Association and into hundreds of other little groups who equally momentarily happen to work for independent production companies would be wholly unrealistic. There is one central Health and Welfare Fund for active employees, one central Health and Welfare Fund for retired employees and one central Pension Fund (App. 22). The heretofore mentioned Contract Services Administration Trust Fund provides the means for the maintenance of industry-wide training programs and industry-wide safety procedures in addition to the Roster System (App. 22). Employees of members of the Association and of Independents alike, are covered by these plans and programs and the contributions of their employers are at the same rates (App. 22). In fact, the Board majority itself concluded that the "Association Basic Agreement" and the "Independent Basic Agreement" are "identical . . . in all essential respects, except for a different method of computing vacation and holiday pay", which takes into account the frequently short life span of the Independents (App. 95 and *id.* n. 3).

The Board decision, enforced by the Court of Appeals, did not outlaw the roster system as such. The Board acknowledged that giving preference in employment based on experience while working under a collective bargaining agreement containing the same seniority provisions was valid *but only so long as such preference is limited to employment within a single bargaining unit* (App. 65-66).

Thus, the decision of the Court of Appeals, enforcing the Board's order, would eliminate the industry-wide roster system and thereby effectively decimate the industry-wide labor pool which has served the industry well for almost a quarter of a century. Instead, under the present agreements, there would be one large roster for the members of the Association and, theoretically, hundreds of small and often tiny rosters for the Independents. Total chaos would result:

1. The Roster for Association members would have to be newly created out of the presently existing roster by deleting all time heretofore credited for work performed for employers who are not members of the Association. Numerous skilled craftsmen would no doubt lose their roster standing.

2. Many persons in the labor pool would be eligible for placement on more than one Independent roster. Each such placement would require a separate application, a separate interview by the qualifications committee and a separate physical examination. The cost of this process would be prohibitive. The administration of multiple roster systems covering thousands of employees working for hundreds of employers who are hired project-by-project and often day-by-day would be an impossible task. No Independent roster would be large enough to supply an adequate labor pool for the employer. No Independent would be able to supply sufficient employment opportunities for the persons on its roster.

3. A single roster based solely upon employment by members of the Association would also fail to provide a feasible alternative. Such a roster would necessarily be much smaller than the present one. It would not provide a sufficiently large pool to meet the needs

of the Association's members during periods of high demand, and employment opportunities for persons in the pool would not be sufficiently consistent and secure to prevent the dissipation of the pool by exit into other areas of employment.

An answer to the question presented for review by this Court is also important to the labor relations of other major industries. For instance, there can be no question that a determinative answer to this question, is required by the trucking industry.

Clauses commonly found in labor agreements in the trucking industry, provide that upon merger or consolidation of facilities under certain specified circumstances employees shall be given credit for seniority achieved while working under collective bargaining agreements. In *Whiting Milk, supra,* such a clause was interpreted by the parties to deny any seniority credit to those employees of White Brothers, who, prior to the purchase of its business, had not been covered by any collective bargaining agreement, while those former employees of White Brothers who had worked under collective bargaining agreements were credited with their prior seniority. The Court of Appeals for the First Circuit held, contrary to the Board, that this interpretation and application of the clause did not violate the Act. *N.L.R.B. v. Whiting Milk Corporation, supra.* In *Teamsters' Freight Local No. 480* (Hilton D. Wall), *supra,* the Board was again faced with the same interpretation of a very similar clause but under the National Master Freight Agreement as supplemented by the Southern

Conference Area Agreement covering employees in the trucking industry in the South. 167 NLRB at 921 n. 2, *supra*. The Board followed its own decision in *Whiting Milk* and again found a violation. The Court of Appeals for the Sixth Circuit enforced the Board's order without opinion. *N.L.R.B. v. Teamsters Local No. 480, supra.*

There can be no question that the Board equates the denial of seniority credit to employees in the trucking industry who have not worked under collective bargaining agreements with the denial of industry experience roster credit to employees in the motion picture and television industry who have not worked under collective bargaining agreements containing the same seniority industry experience roster provisions. *N.L.R.B. v. Teamsters' Freight Local No. 480, supra,* and its own decision in *Whiting Milk Corporation, supra,* were the only cases cited by the Board majority in support of its conclusion that the application of the roster provisions in this case violated the Act by

> "penal[izing] employees for having exercised their statutory right to refrain from bargaining collectively through Respondent in the past, while rewading those employees who have chosen to work in units represented by Respondent."[8] (App. 97).

"[8]See *Teamsters' Freight Local No. 480 (Hilton D. Wall)*, 167 NLRB 920, enfd. 409 F.2d 610 (C.A. 6); *Whiting Milk Corporation*, 145 NLRB, enforcement denied, 342 F.2d 8 (C.A. 1). *Although enforcement was denied in Whiting, we believe the rationale in Hilton D. Wall to be correct, and we respectfully disagree with the Court's rationale in Whiting.*" (App. 97) (emphasis added).

III.

The Decision of the Court of Appeals in This Case Is in Direct Conflict With the Decision of the Court of Appeals for the First Circuit in Whiting Milk.

We have already pointed out (Point II, *supra*) that the Board majority in this case clearly viewed its decision as in conflict with the Court decision in *Whiting Milk*. An analysis of the two cases fortifies this conclusion.

In the instant case, the Administrative Law Judge (then called "Trial Examiner") found that there was no requirement of union membership or of a union permit for placement on the roster or for treatment by the union as having roster status (App. 34). He stated that therefore the "hiring arrangement (or roster system) did not violate the Act unless there was specific evidence of preference because of union membership or other similar requirement" (App. 43). He found that there was no such evidence and that in the cases of Lapenieks and Colman, Local 659 had done nothing more than to apply the roster system (App. 62). Accordingly, he concluded that the Act had not been violated. (App. 88-89).[3] He found it therefore unnecessary to decide whether members of the Association and the Independents constitute a single multi-employer unit (App. 31).

The Board majority left the factual findings of the Administrative Law Judge undisturbed (App. 91 n.1)—*i.e.*, that the roster system and its application were free of any evidence of union membership or similar requirements. Nevertheless, it concluded that "initial em-

[3]Alternative grounds for the recommended order to dismiss the complaint are not discussed here because they are not relevant to the question presented.

ployment in a unit represented by Respondent is based strictly on union considerations" (App. 102). It characterized the ultimate issue and its resolution as follows:

> "The question here is not what seniority rights an employee acquires after working in a unit represented by Respondent, but what rights the applicant is to start with when he seeks employment with an employer who is party to a collective-bargaining agreement with Respondent and/or IATSE. Respondent admits that if an employee had acquired seniority rights under a collective-bargaining contract to which Respondent and/or IATSE is a party, those rights will be honored where the employee seeks employment in an entirely separate unit which is also represented by Respondent. On the other hand, an employee cannot commence work in a unit represented by Respondent unless he has previously worked in a unit covered by a collective-bargaining contract to which Respondent and/or IATSE is a party. *Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent.*" (App. 99). (Emphasis added).

The Board majority reasoned that such "union considerations" were permissible only within a single bargaining unit (App. 98) and, holding that the members of the Association and the Independents do not constitute a single bargaining unit (App. 97-98), that the

application of the roster system therefore coerced employees in the exercise of their statutory right to choose to be represented by a union or to refrain from doing so (App. 97), and thus violated Section 8(b)(1)(A) of the Act (App. 102). To emphasize: *the only "union consideration"* found by the Board majority was the requirement that work to be credited toward roster status had to be performed "under a collective-bargaining agreement containing the same seniority provisions as those contained herein" (App. 10). The Memorandum Opinion of the Court of Appeals, granting enforcement of the Board's order states:

> "A finding of a section 8(b)(1)(A) violation does not require actual proof of intent to influence the exercise of section 7 rights. The Board's inferences concerning the 'natural foreseeable consequences of the conduct' were adequately supported by the record." (App. 113).

It may therefore be safely assumed that the Court agreed with the Board's reasoning.

In *Whiting Milk*, as here, the sole basis for violation of the Act found by the Board was preference in employment based on prior employment under a collective-bargaining agreement in a different bargaining unit. Denying enforcement, the Court of Appeals for the First Circuit disposed of the issue as follows:

> "The long and short of this case is that the Union bargained for and obtained a benefit for employees in the units it represented. This is not illegal discrimination against employees *in other units* not represented by the Union but only a normal natural incident of union representation. Obtaining a benefit for employees may well en-

> courage others to join a union but that side effect does not violate the Act, for 'The truth is that the union is a service agency that probably encourages membership whenever it does its job well.' Local 357, International Brotherhood of Teamsters, etc. v. NLRB, 365 U.S. 667, 675-676, 81 S.Ct. 835, 840, 6 L.Ed. 2d 11 (1961). It follows that Clause 81 of the Milk Industry Agreement does not discriminate against any right possessed by the non-represented Hyannis employees of White Brothers in violation of §8(a)(1) or (3) or §8(b)(1)(A) or (2) of the Act." 342 F. 2d, at 11, *supra* (Emphasis added).

The conflict between the two decisions could not be clearer.[4]

IV.

The Decision of the Court of Appeals in This Case Is at Least Conceptually in Conflict With the Decision of the Court of Appeals for the Third Circuit in Rosen.

In *Nu-Car Carriers, Inc.*, 187 NLRB 850 (1971), the Board considered the validity of a teamster pension fund provision crediting employees with past service credits for work performed under any teamster contract prior to 1952. The Board dismissed the complaint. On review *sub nom., Rosen v. N.L.R.B., supra,* the Court of Appeals for the Third Circuit affirmed. The Court pointed out that there was no requirement that

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[4]We anticipate that it may be argued in opposition to the Petition that *Whiting Milk* is distinguishable because it involved retention of seniority rather than gaining initial employment (see App. 98-99). We respectfully submit that this is a distinction without a difference. An employee who loses his seniority rights is the first to be laid off.

the employee had to have been a union member (just as the Administrative Law Judge found in the instant case). It held that there was no illegal discrimination in favor of employees represented by the union since union and nonunion employees participated on an equal basis and concluded that the preference was nothing more than the natural consequence of union representation, referring to *Whiting Milk* (*Rosen v. N.L.R.B., supra,* 455 F.2d at 617-618).

Except for the difference in the nature of contractual benefits involved, the conflict between decisions is again direct and clear.

V.

Assuming That the Decisions of Other Courts of Appeal Were to Be Viewed as Not Conflicting With the Decision of the Court of Appeals in This Case, the Question Presented Is an Important One Which Has Not Been and Should Be Settled by This Court.

We have already pointed out *in extenso* the importance of the question presented (See Point II, *supra*). Petitioner argues eloquently in its brief that the Decision of the Court of Appeals in the instant case is in conflict with the decision of this Court in *Local 357, Teamsters v. N.L.R.B.*, 365 U.S. 667 (1961) (Pet. 20-24). Even if this were not so, at worst, clearly then, this Court has never decided the question presented. Though the Court below cites *Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 734 (1964) in support of its decision (App. 113) as a matter of fact, in *Lummus*, the same Court of Appeals based its finding of a violation upon "an incident keyed to union membership". The Court expressly stated there that it need not decide "whether a discrimination based entirely upon causes not related to

union membership or activity is violative of the statute." *Lummus Co. v. N.L.R.B., supra,* 339 F.2d at 733.

In *Whiting Milk, supra,* the Court remarked that it had not been cited to any cases even closely in point and that it had found none. *N.L.R.B. v. Whiting Milk Corporation, supra,* 342 F.2d at 10. If there is no conflict with the decision of this Court in *Local 357, Teamsters* and with the decision in *Whiting Milk,* then the Court of Appeals for the District of Columbia, in deciding the very issue which it reserved in *Lummus,* has rendered a decision of first impression. Due to the importance of the question in the Administration of the Act and, because of the vast impact of the decision on industries characterized by casual, transient employment in general, and on the motion picture and television industry in particular, this question should be settled by this Court.

Conclusion.

For all of the reasons stated in this brief, we respectfully urge that the Petition for a Writ of Certiorari as to the Second Question Presented for Review should be granted.

Respectfully submitted,

HARRY J. KEATON,

Attorney for the Association of Motion Picture and Television Producers, Inc., Amicus Curiae.

MITCHELL, SILBERBERG & KNUPP,

Of Counsel.

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In the Supreme Court of the United States

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, PETITIONER

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OPINIONS BELOW

The order and memorandum of the court of appeals (Pet. App. 112-113) is reported at 477 F. 2d 450. The decision and order of the National Labor Relations Board (Pet. App. 90-111) are reported at 197 NLRB No. 134.

JURISDICTION

The judgment of the court of appeals (Pet. App. 114-115) was entered on June 21, 1973. The petition for a writ of certiorari was filed on September 17, 1973. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the union caused employers with whom it had collective agreements to discriminate against applicants for employment on the basis of whether they had previously been represented by that union.

2. Whether, in the circumstances of this case, the Board's Regional Director properly withdrew his approval of a settlement agreement entered into between the union and the charging party.

STATUTE AND RULE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations and Statements of Procedure are set forth at Pet. 3-4. Also relevant is Section 101.6 of the Board's Statements of Procedure (29 C.F.R. 101.6):

> If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the general counsel in Washington, D.C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D.C., where the case is fully reviewed by the general counsel with the assistance of his staff. * * * Following such review, the general counsel may sustain the regional director's dismissal, stating the grounds of his affirmance, or may direct the regional director to take further action.

STATEMENT

A. The Settlement Negotiations

On December 20, 1966, Joel Colman filed a charge against petitioner, Local 659, with the Board's Regional Director, alleging, *inter alia,* that due to the union's discriminatory maintenance of its Industry Experience Roster he had been denied employment as a motion picture photography director (Pet. App. 2-3). On January 30, 1967, Vilis Lapenieks filed a similar charge (*ibid.*). Pursuant to Section 101.7 of the Board's rules (Pet. 4), the union and the charging parties were provided the opportunity to, and did, enter into settlement agreements (Pet. App. 91-92). Both agreements provided, *inter alia,* that "the union will make whole Joel Colman and Vilis Lapenieks by payment to each of them of back pay plus interest, such amounts to be determined by the Regional Director in accordance with existing Board formula" (Pet. App. 92).

Thereafter, the Regional Director notified Colman that he was entitled to back pay of approximately $400 (Pet. App. 92; E.A. 91).[1] Colman, contending that he was entitled to $40,000, requested that the Regional Director permit him to withdraw from the settlement agreement in order to appeal the back pay determination to the General Counsel (Pet. App. 4, n. 2, 93). The Regional Director granted the request, and Colman filed an appeal with the General Counsel (Pet. App. 4, n. 2, 92; E.A. 93).

The General Counsel sustained the appeal, concluding that the settlement agreement did not adequately remedy

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[1] "A." refers to the printed appendix in the court below, and "E.A." to the separate appendix containing exhibits.

the alleged violations of the Act (Pet. App. 4-5, n. 2, 92-93). The Regional Director accordingly recomputed Colman's back pay and determined that he was entitled to $16,539.63 (Pet App. 4, n. 2, 93). Local 659 refused to pay Colman this amount, whereupon the Regional Director withdrew his approval of the settlement agreements and issued a complaint on the charges filed by Colman and Lapenieks (*ibid.*).

B. The Board's Findings of Fact

The following evidence was adduced at the hearing on the complaint:

Local 659, which represents motion picture cameramen, is one of 22 affiliates of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators ("IATSE") in the Los Angeles area (Pet. App. 94). IATSE negotiates basic industry-wide agreements which are incorporated by reference in the contracts which Local 659 negotiates with the employers subject to its jurisdiction (Pet. App. 17; A. 125; E.A. 17). One IATSE agreement, known as the "Association Basic Agreement," is negotiated with the Association of Motion Picture and Television Producers, Inc. ("Association"), which had about 67 members at the time of the Board hearing (Pet. App. 17, 19). The Assocation does not claim authority to bargain for or bind anyone other than its members (Pet. App. 97-98; A. 132).

Using the Association Basic Agreement as the pattern, IATSE then prepares a proposed "Independent Basic Agreement," which is mailed to the some 200-500 prior signatories who are not members of the Association (Pet. App. 19; A. 121-123, 126-127). Upon receiving his copy of the proposed agreement, each independent employer

decides whether or not to sign it, and advises IATSE of his decision (Pet. App. 95; A. 123-124, 126). Further negotiations are then conducted among Local 695, IATSE and the Association, resulting in the "Local 659 Agreement" (Pet. App. 95; A. 117, 125).

The Association and Independent Basic Agreements provide that the signatory employer will "give preference of employment to persons having experience in the motion picture industry in * * * Los Angeles County," and that "[t]he definitive terms of such preference or seniority shall be those contained in the industry experience roster systems" (Pet. App. 95, n. 5; E.A. 4). Implementing this provision, the Local 659 Agreement requires signatory employers to give "preference of employment in hiring and rehiring" to employees whose names appear on the Industry Experience Roster (Pet. App. 95; E.A. 23-24). The Local 659 Agreement further provides that, in order to be placed on the roster, an employee must have at least 30 days' work experience with one employer, or 90 days' work experience with several employers, "engaged in the production of motion pictures in the Motion Picture Industry in Los Angeles County (under a collective bargaining agreement containing the same seniority provisions as those contained herein)" (Pet. App. 95; E.A. 21).

Thus, while an employee's work experience with any signatory to either the Association or the Independent Basic Agreement is counted in determining his roster eligibility, his experience with other employers in the motion picture industry is not considered (Pet. App. 96). An employer may hire a non-roster employee only when there are no available roster employees within the job classification the employer needs (Pet. App. 27-28; A. 248, 266-269).

Joel Colman and Vilis Lapenieks are both well qualified directors of photography with extensive experience in their field. However, neither was on the Industry Experience Roster, nor eligible to be placed on the roster, since his experience had been with employers who did not have contracts with IATSE or Local 659 (Pet. App. 100; A. 150, 173-176, 181-182, 184, 187-188, 192-194; E.A. 31-41).

In July 1966, Y-A Productions, Inc. ("Y-A"), an independent producer which was making a feature documentary film, desired to sign an IATSE contract, but indicated that it wanted to use Lapenieks as director of photography. Local 659 replied that, if Y-A signed a contract, Lapenieks could not be hired since he was not eligible for placement on the roster (Pet. App. 100; A. 138148, 177-178; E.A. 42-45). Y-A signed the contract because its financial backer, Columbia Studios, was a member of the Association and thus could finance the film only if it were produced in accordance with IATSE conditions (Pet. App. 100-101; E.A. 46-51). Ultimately, Y-A hired a director of photography other than Lapenieks (Pet. App. 101-102; A. 141-148; E.A. 52).

Similarly, in August 1966, MPO-TV of California, a signatory to an Independent Basic Agreement, sought permission from Local 659 to hire Colman as a director of photography for a 2-day assignment. The Union refused because Colman was not on the roster, and added that, if MPO used Colman, all IATSE people would be pulled off the stage. Colman was not hired for this assignment (Pet. App. 101; E.A. 59; A. 188-191, 305-309). Later, MPO and Colman reached agreement on a 3-year contract, subject to approval by Local 659 (Pet. App. 102; A. 309-313, 188-191, 352-359). When MPO notified Local 659, it replied that, since Colman's name did not appear on the

roster, he could not be hired by MPO (Pet. App. 102; E.A. 60-62).

C. The Board's Conclusions and Order

The Board (Chairman Miller dissenting) held that the Regional Director had properly proceeded with the complaint. The Board explained (Pet. App. 93):

> * * * [T]here was no meeting of the minds when the settlement agreements were executed. Colman expected to receive a sum far in excess of $400. [Local 659] expected a liability substantially less than $16,539.63, the amount ultimately computed by the Regional Director. And the Regional Director was apparently faced with uncertainty as to the choice of a formula for making his determination. In such circumstances, we believe that it would be inequitable to hold the parties to the commitments contained in the settlement agreements, and we find that the Regional Director did not commit reversible error in withdrawing approval of the settlement agreements and reopening the case for further proceedings .* * *

On the merits, the Board found that the roster provisions, as interpreted and applied, restricted employment to employees who had worked with "employers having a collective-bargaining agreement with [Local 659] and/or IATSE" (Pet. App. 96). The Board rejected Local 659's contention that the Independents and the members of the Association constituted a single multi-employer bargaining unit and the roster provisions merely protected the integrity of that unit. The Board found that "the Independent employers did not in fact comprise a part of a single unit for bargaining" (Pet. App. 97-98):

> * * * [Local 659] admits that the Independents were always given the option to negotiate separately if they desired. Furthermore, the Independents can refuse to be bound by any agreement negotiated by any multi-employer group, simply by not signing the resulting contract. It is not until the Independents have received the proposed agreement and discussed it that each Independent individually decides whether or not to become a party to the agreement. In addition, the Association has not been authorized to negotiate on behalf of any Independent employer.* * *

Accordingly, the Board concluded that, by the manner in which Local 659 has applied the roster provisions with respect to Colman and Lapenieks, "[it] has unlawfully restrained and coerced employees in the exercise of their statutory rights and thereby violated Section 8(b)(1)(A) of the Act" (Pet. App. 102).

The Board's order requires Local 659, *inter alia,* to make Colman and Lapenieks whole for any loss of pay they suffered because of the unfair labor practices against them, and to cease and desist from applying its collective bargaining agreements with the Association, or with employers outside the Association, in any manner which discriminates against any employee with respect to his initial employment and/or placement on the industry experience roster on the basis of union representation (Pet. App. 105-106).

D. The Court of Appeals' Decision

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 112-113).

ARGUMENT

1. Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union "to restrain or coerce * * *

employees in the exercise of rights guaranteed in Section 7." The latter section guarantees "the right to refrain from any or all" concerted or union activities. "The incorporation of a provision in a collective bargaining agreement affording to union members preference in job referrals by the union violates Section 8 (b)(2) and (1)(A) of the Act." *National Labor Relations Board* v. *Local 269, Int'l Bro. of Electrical Workers,* 357 F. 2d 51, 55 (C.A. 3). Moreover, it is unlawful to accord employment preference based upon union representation. See *National Labor Relations Board* v. *Int'l Ass'n of Machinists, District Lodge 727,* 279 F. 2d 761 (C.A. 9) certiorari denied, 364 U.S. 890; *Teamsters Freight Local No. 480,* 167 NLRB 920, 924, enforced, 409 F. 2d 610 (C.A. 6).

The Board correctly found that Local 659's roster provisions resulted in discrimination among employees based solely on union representation, since "an employee cannot commence work in a unit represented by [Local 659] unless he has previously worked in a unit covered by a collective-bargaining contract to which [Local 659] and/or IATSE is a party," and "the existence of a collective-bargaining contract connotes representation by * * * [Local 659]" (Pet. App. 99). Petitioner attempts to justify this otherwise illegal preference in hiring by contending that the signatories to the Association and Independent Basic Agreements are members of a single multi-employer unit (Pet. 6-7, 20-21), and that the roster system merely regulates seniority status of employees within a single unit.[2] The Board

[2]Length of experience within a bargaining unit—including a multi-employer unit—may be a valid basis for selecting employees for job openings within the unit itself. See *Schick* v. *National Labor Relations Board,* 409 F. 2d 395, 398-399 (C.A. 7); *Local 229, Teamsters,* 185 NLRB 631.

found, however, that "each Independent employer comprised a separate bargaining unit"; hence, "[w]e are not faced here with a situation where new employees are being placed at the bottom of a unit seniority list" (Pet. App. 98).

The issue whether the Board properly found that the Independents and the Association did not constitute a single multi-employer unit turns on the facts of this particular case and does not warrant further review. In any event, the record fully justifies the Board's conclusion (*supra*, pp. 4-5).[3]

National Labor Relations Board v. *Whiting Milk Corp.*, 342 F. 2d 8 (C.A. 1), and *Rosen* v. *National Labor Relations Board*, 455 F. 2d 615 (C.A. 3) (Pet. 24-25), do not support the restrictions on employment which petitioner imposed here. In neither case did the union seek to restrict initial employment in the unit to those who previously had been represented by the union. *Whiting* involved a contract clause providing that, if the company acquired another company under contract with the union, the seniority of the employees of the acquired company would be carried over to the acquiring company. The First Circuit held that the fact the contract did not accord similar treatment to employees of acquired companies not under contract with

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[3]Contrary to petitioner's contention (Pet. 20-21) the Board's finding that there was no multi-employer unit was not based on the Independents' lack of membership in the Association. Rather, the Board found that the employer signatories to the Independent Basic Agreement had not indicated an unequivocal intention to be bound by group rather than individual action (Pet. App. 97-98). See *Associated Shoe Industries, Inc.*, 81 NLRB 224, 229; *Int'l Bro. of Electrical Workers, Local No. 68* v. *National Labor Relations Board*, 448 F. 2d 1127, 1136 (C.A.D.C.).

the union did not make the contract clause unlawfully discriminatory. The court reasoned that nothing in the clause precluded employees in a non-union company from bargaining with that company for seniority rights which would survive a merger or transfer of the business, or from bargaining with the new company for such right (342 F. 2d at 11). By contrast, here there is no way for a prospective employee to protect himself against the operation of the Industry Experience Roster.

Rosen presented the narrow question of the validity of a factual presumption based on union membership. *Rosen* involved a pension fund rule, which required both union and non-union employees, in establishing active service prior to 1952, to show that they had worked a certain period of time for an employer who made payments into the pension fund, but presumed that the persons who were union members prior to 1952 had pre-1952 qualifying experience. The court found that the rule was not unlawfully discriminatory because the union members invoking the presumption "also qualified for benefits by virtue of having in fact worked in covered employment" (455 F. 2d at 618).

Petitioner contends (Pet. 21) that "[t]he result of the Board's decision is to do away with industry seniority and the employers' resultant ability to maintain an available pool of qualified personnel." Nothing in the Board's decision, however, limits Local 659's right to condition hiring on experience in the industry. That decision merely strikes down Local 659's restriction of industry experience to tenure with employers under contract with the union.

2. The other question posed by the petition (Pet. 2)—whether a settlement agreement can be set aside in the absence of further unfair labor practices—is not

presented on this record. For the Board found that no settlement agreement had been reached here; in view of the wide difference between the union and Colman over the amount of back pay due, "there was no meeting of the minds when the settlement agreements were executed" (Pet. App. 93). In these circumstances, the Regional Director did not exceed his authority in permitting Colman to withdraw from the agreement in order to appeal to the General Counsel.[4] When the General Counsel sustained Colman and ordered the back pay recomputed, it was the union which was unwilling to settle on that basis (*supra*, p. 4).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. Come,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

DECEMBER 1973.

[4]Section 101.7 of the Board's Statements of Procedure (Pet. 4) permits a charging party who will not join in a settlement or adjustment deemed adequate by the Regional Director to appeal to the General Counsel, as provided in Section 101.6 (*supra*, p. 2).